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In The
Supreme Court of the United States

WASHINGTON STATE DEPARTMENT OF LICENSING,

PETITIONER,

v.

COUGAR DEN, INC., A YAKAMA NATION CORPORATION,

RESPONDENT.

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF WASHINGTON

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

An 1855 treaty between the United States and the Yakama Indian Nation provides members of the tribe "the right, in common with citizens of the United States, to travel upon all public highways." In a series of cases, the Ninth Circuit has rejected claims that this language exempts the Yakama from taxes or state fees on off-reservation commercial activities, holding instead that the language is limited to securing for tribal members a right to travel on public highways without paying a fee for that use or obtaining state approval. In this case, however, the Washington Supreme Court interpreted the treaty far more broadly, holding that it implicitly prohibits states from taxing "any trade, traveling, and importation" by the Yakama, even off-reservation, "that requires the use of public roads." The court therefore held that the treaty preempts Washington from imposing wholesale fuel taxes on Respondent Cougar Den, a Yakama-owned fuel distributor that imports millions of gallons of fuel into Washington annually for sale to the general public.

The question presented is:

Whether the Yakama Treaty of 1855 creates a right for tribal members to avoid state taxes on off-reservation commercial activities that make use of public highways.

PARTIES

The Washington State Department of Licensing is the Petitioner and was the appellant in the Washington Supreme Court.

The Respondent is Cougar Den, Inc., and is a company incorporated under the laws of the Yakama Indian Nation. Cougar Den, Inc., was the respondent in the Washington Supreme Court.

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INTRODUCTION

The Washington Supreme Court's ruling below adopts a treaty interpretation antithetical to the Ninth Circuit's reading of the same provision, uses an approach long rejected by this Court, and will cost Washington (and likely other States) hundreds of millions of dollars. This Court should grant certiorari.

Respondent Cougar Den is a wholesale fuel distributor owned by a member of the Yakama Indian Nation. Since 2013, Cougar Den has used a non-Indian contractor to import millions of gallons of fuel into Washington every year for resale, without a fuel distributor license. Cougar Den refuses to pay state tax on the fuel. It is undisputed that the tax's incidence is outside the Yakama Reservation.

Cougar Den claims that it is exempt from state taxes on trade under Article III of the 1855 treaty between the Yakama Nation and the United States, which provides tribal members "the right, in common with citizens of the United States, to travel upon all public highways." The Ninth Circuit has rejected this argument as to both state cigarette fees and federal fuel taxes. *See King Mountain Tobacco Co., Inc. v. McKenna*, 768 F.3d 989 (9th Cir. 2014), *cert. denied*, 135 S. Ct. 1452 (2015); *Ramsey v. United States*, 302 F.3d 1074 (9th Cir. 2002), *cert. denied*, 540 U.S. 812 (2003). Instead, the Ninth Circuit has held that the treaty exempts Yakama members only from fees charged for using the highways (such as truck permitting fees) and from obtaining state approval prior to using the highways. *See Cree v. Flores*, 157 F.3d 762 (9th Cir. 1998); *United States v. Smiskin*, 487 F.3d 1260 (9th Cir. 2007). The Ninth Circuit has

explicitly rejected the idea that Article III creates a "right to trade" off the reservation free from state taxes. *King Mountain*, 768 F.3d at 998.

Contradicting these Ninth Circuit holdings, the Washington court ruled for Cougar Den, granting it a massive tax exemption. It found that the Yakamas' treaty "right, in common with citizens of the United States, to travel upon all public highways," implicitly exempted Cougar Den from state wholesale fuel taxes, even though the tax "is assessed regardless of whether Cougar Den uses the highway" and no Yakama transported the fuel. App. 13a-14a. The court inferred this new right "[b]ased on the historical interpretation of the Tribe's essential need to travel." App. 16a.

The Washington Supreme Court's untenable interpretation of a federal treaty cries out for this Court's review. It not only conflicts with the Ninth Circuit's reading of the same language, but it also infers a tax exemption despite this Court repeatedly holding that "Indians going beyond reservation boundaries" are subject to non-discriminatory state taxes "[a]bsent *express* federal law to the contrary," and that "tax exemptions are not granted by implication." *Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 148-49, 156 (1973) (emphasis added). The ruling will cost Washington hundreds of millions of dollars in fuel tax revenue and means that whether any other state tax—including cigarette taxes—is preempted as to the Yakama will now depend primarily on whether the tax is challenged in state or federal court. No State should face this dilemma, certainly not based on a state court's atextual approach to treaty interpretation long-rejected by this Court. The Court should grant certiorari.

OPINIONS BELOW

The Washington Supreme Court opinion is reported at 188 Wash. 2d 55, 392 P.3d 1014 (2017). App. 1a-29a. The order of the superior court is unreported. App. 30a-43a. The administrative order of the Director of the Department of Licensing is unreported. App. 44a-61a.

JURISDICTION

The Washington Supreme Court entered its opinion on March 16, 2017. App. 1a. The opinion is a final judgment and the jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

STATUTES

Article III of the Yakama Treaty of 1855 states:

> *And provided*, That, if necessary for the public convenience, roads may be run through the said reservation; and on the other hand, the right of way, with free access from the same to the nearest public highway, is secured to them; as also the right, in common with citizens of the United States, to travel upon all public highways.

Treaty With the Yakamas, art. III, ¶ 1, 12 Stat. 951, 952-53 (June 9, 1855, ratified Mar. 8, 1859, proclaimed Apr. 18, 1859).

STATEMENT OF THE CASE

A. Washington's Motor Vehicle Fuel Tax

Washington, like other states, taxes motor vehicle fuels. Wash. Rev. Code 82.36 (gasoline);

Wash. Rev. Code 82.38 (diesel fuel);[1] App. 4a; 51a. Washington imposes its tax when wholesale fuel is removed from bulk storage (such as when a tanker truck obtains fuel from a refinery), or when wholesale fuel in a tanker truck or rail car "enters into this state" after being removed from bulk sources outside the state. Wash. Rev. Code § 82.36.020(2)(c); Wash. Rev. Code § 82.38.030(7)(c); App. 51a-52a ("Fuel taxes are imposed at the wholesale level, when fuel is removed from the terminal rack or imported into the state."). The tax does not apply to those who transport fuel; it applies to the wholesale fuel supplier or distributor, regardless of how the fuel is transported, whether by rail, tanker truck, barge, pipeline, or otherwise. *See* Wash. Rev. Code § 82.36.020; Wash. Rev. Code § 82.38.030. Most states impose this type of tax at the wholesale level.[2]

Washington collects its fuel taxes through a license system administered by the Department of Licensing. App. 52a; Wash. Rev. Code § 82.36.080; Wash. Rev. Code § 82.38.090. When licensed fuel distributors purchase wholesale fuel from a bulk facility within Washington (typically a refinery or tank farm), the seller pays the tax. Wash. Rev. Code § 82.36.026; Wash. Rev. Code § 82.38.035. But if a

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[1] Citations refer to the 2013 Revised Code of Washington, in effect when the events in this case occurred. In 2016, Wash. Rev. Code 82.36 and Wash. Rev. Code 82.38 were merged without substantive change into a single chapter, Wash. Rev. Code 82.38. *See* 2013 Wash. Sess. Laws, page nos. 1322-1405 (ch. 225); 2015 Wash. Sess. Laws, page no. 1178 (ch. 228, § 40).

[2] Fed'n of Tax Admins., *State Motor Fuel Tax Points of Taxation Charts*, https://www.taxadmin.org/assets/docs/Motor Fuel/other-data/2012_pointstax.pdf.

distributor buys wholesale fuel from a bulk facility outside Washington and brings it into the State, then the tax applies when that fuel enters Washington and the distributor pays the tax after bringing the fuel into the State. App. 53a; Wash. Rev. Code §§ 82.36.026, .031, .035; Wash. Rev. Code §§ 82.38.030(9)(b), (c), .035(3). If an unlicensed person deals in wholesale fuel, the tax applies plus a penalty for acting without a license. App. 53a; Wash. Rev. Code §§ 82.36.100, .045, .080; Wash. Rev. Code § 82.38.170(6). The Department may assess taxes, penalties, and interest if it finds that taxes have been avoided. App. 53a; Wash. Rev. Code § 82.36.045; Wash. Rev. Code § 82.38.170. A Department assessment may be challenged in an agency hearing, followed by judicial review under the state Administrative Procedure Act, which occurred in this case. App. 53a.

Washington adopted its current fuel tax structure in 2007, after a federal district court ruled that the prior version of the statutes put the incidence of the tax on fuel retailers (gas stations). That ruling affected collection of taxes on fuel sold at Indian-owned gas stations within Indian reservations. App. 20a-22a. The 2007 amendments moved the incidence of the tax up the supply chain to persons who supply the fuel to retailers. *See* 2007 Wash. Sess. Laws, page nos. 2426, 2436 (ch. 515, §§ 20, 33) ("the tax shall be imposed at the time and place of the first taxable event and upon the first taxable person within this state"); Wash. Rev. Code § 82.36.022; Wash. Rev. Code § 82.38.031; App. 21a-22a; *see also Oklahoma Tax Comm'n v. Chickasaw Nation*, 515 U.S. 450, 460 (1995) ("[I]f a State is unable to enforce a tax because the legal incidence of the impost is on Indians or

Indian tribes, the State generally is free to amend its law to shift the tax's legal incidence."). As a result, since 2007 Washington fuel taxes have mirrored the tax upheld in *Wagnon v. Prairie Band Potawatomi Nation*, 546 U.S. 95 (2005) (Kansas fuel tax imposed outside Indian country on fuel wholesalers is valid notwithstanding economic effect on tribal gas station within Indian country).

B. Cougar Den Is a Yakama Indian Owned Company that Did Not Pay State Taxes on Wholesale Fuel Brought into Washington

The Yakama Nation is a federally recognized Indian tribe. App. 62a-63a; *Brendale v. Confederated Tribes & Bands of the Yakima Indian Nation*, 492 U.S. 408, 415 (1989). It is the successor in interest to tribes and bands that executed a treaty in 1855 to "cede, relinquish, and convey to the United States all their right, title, and interest in and to the lands and country occupied and claimed by them" in Washington Territory. Treaty with the Yakamas, art. I, 12 Stat. 951, 951 (1855). In Article II, the treaty reserved a tract known today as the Yakama Indian Reservation. 12 Stat. at 952. Roughly twenty percent of the reservation's 1.3 million acres are owned in fee by individual land-owners, with the remainder held in trust by the United States. *Brendale*, 492 U.S. at 415. "Most of the fee land is found in Toppenish, Wapato, and Harrah," three state-incorporated cities located within the reservation. *Id.* "The remaining fee land is scattered throughout the reservation in a 'checkerboard' pattern." *Id.* State highways and county roads funded by state fuel taxes serve these cities and the reservation. *See* Wash. Rev. Code § 46.68.090.

Respondent Cougar Den is owned by a Yakama member and incorporated under Yakama law. App. 2a, 63a (Stip. Facts 5-7). It has never applied for or held a Washington license to distribute wholesale fuel. App. 49a, 63a. It obtained an Oregon fuel dealer license in 2012 and used it to purchase wholesale fuel in Portland, Oregon. App. 63a, 64a. Cougar Den avoided paying Oregon fuel taxes by representing that its fuel would be exported wholesale across the state line into Washington under a tribal license. *See* Or. Rev. Stat. § 319.240. Cougar Den stipulated that it wholesaled millions of gallons of fuel in a matter of months without paying Washington state taxes. App. 64a (Stip. Facts 12-14). Cougar Den contracted with KAG West, a non-tribal company and subsidiary of North America's largest tank truck transporter, to transport its fuel from Oregon to Washington in KAG West's trucks. App. 40a. In this case, Cougar Den sold its fuel to Yakama-owned retail gas stations in Wapato, within the Yakama Reservation. App. 50a. Those stations sold the fuel to the general public. App. 50a.

After learning that Cougar Den brought millions of gallons of fuel into Washington without paying taxes, the Department assessed $3.6 million in taxes, penalties, and interest for wholesale fuel activities between March 2013 (when Cougar Den started its wholesale operation) and October 2013. App. 49a. Cougar Den continued to bring untaxed wholesale fuel into Washington and deliver it to retail stations without paying taxes. The Department continued to assess taxes, and later assessments are stayed in various administrative or judicial reviews, involving tens of millions of dollars in

avoided taxes. Similarly situated Yakama-owned businesses have expanded operations into California, shipping untaxed fuel to several Indian reservations there. App. 28a.

C. The Department of Licensing Rejected Cougar Den's Treaty Defense to Taxation in an Administrative Proceeding

In an administrative hearing challenging the assessment, Cougar Den raised only legal issues. It did not dispute that the tax applied outside the reservation or the amount that would be owed. But it claimed the tax violated Article III of the treaty, which provides for a "right, in common with citizens of the United States, to travel upon all public highways." 12 Stat. at 953.

The Director of Licensing entered a final order rejecting Cougar Den's argument that the treaty encompassed a right to trade in untaxed fuel. App. 56a-58a. The order relied on three legal conclusions. First, the "Structure of Washington Fuel Tax Laws" showed that the tax was imposed on wholesale fuel distributors outside the reservation. App. 51a-53a. Cougar Den did not dispute this conclusion. Second, the order relied on this Court's rule that "[o]utside of Indian reservations, Indians are subject to state taxes and regulations absent express federal law to the contrary." App. 54a (citing *Mescalero*, 411 U.S. at 48-49). Third, the order examined prior federal decisions concerning the treaty right to travel on highways. Relying on those decisions, the order held that no treaty language expresses a right to engage in wholesale fuel trading free from the state's tax and without the required

license. App. 56a-58a. The taxes do not violate a treaty right because they "are not a charge for Cougar Den's use of public highways" but relate to the wholesale fuel itself. App. 58a.[3]

D. The Washington Supreme Court Holds that the Yakama Have a Right to Trade Wholesale Fuel Outside Reservation Boundaries that Preempts State Taxation

Cougar Den sought judicial review of the final order, challenging the legal conclusions concerning the meaning of the treaty. A superior court agreed with Cougar Den, ruling that the treaty "shields the transport of fuel, owned by Cougar Den," if fuel is moved on public highways from Oregon "across the Columbia River and into the State of Washington." App. 39a. The Department appealed directly to the Washington Supreme Court. The Yakama Nation appeared as amicus, endorsed Cougar Den's positions, and argued on its behalf.

The Washington Supreme Court affirmed the superior court in a divided decision. Moving quickly past the treaty language, the majority focused on how it thought the Yakama would have understood the treaty when it was signed. App. 6a-9a, 16a. In doing so, the majority relied primarily on the district court and appellate opinions in *Cree v. Flores*, 157 F.3d 762 (9th Cir. 1998). *Cree* involved "various Washington truck license and overweight permit fees," i.e., fees

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[3] Cougar Den first presented its arguments to an administrative law judge, who issued an initial order in Cougar Den's favor. App. 44a. On review, the Director reversed and upheld the tax. App. 59a.

paid in order to use highways. *Id.* at 764. There, the Ninth Circuit held, based on the Yakamas' treaty-time understanding, that "the Treaty clause must be interpreted to guarantee the Yakamas the right to transport goods to market over public highways without payment of *fees for that use*." *Id.* at 769 (emphasis added). The majority recognized that this case was different because here "the tax is imposed at the border and is assessed regardless of whether Cougar Den uses the highway." App. 13a-14a. But the Court held that this was "immaterial because, in this case, it was impossible for Cougar Den to import fuel without using the highway." App. 14a.

To support expanding *Cree*'s holding beyond fees for using a highway, the majority cited *United States v. Smiskin*, 487 F.3d 1260 (9th Cir. 2007), calling it "nearly identical to this case." App. 13a. *Smiskin* rejected prosecution of two Yakama members under the Federal Contraband Cigarette Trafficking Act, which makes it illegal to possess or transport cigarettes without paying state taxes or complying with state law. Washington law allows transport of untaxed cigarettes only if the transporter gives the State advance notice. The Ninth Circuit held that "applying the State's pre-notification requirement to the Smiskins violates the right to travel guaranteed in Article III of the Treaty." *Smiskin*, 487 F.3d at 1264. The majority deemed *Smiskin* controlling because "[i]n both cases, the State placed a condition on travel that affected the Yakamas' treaty right to transport goods to market without restriction." App. 13a.

The majority sought to distinguish *King Mountain Tobacco Co., Inc. v. McKenna*, 768 F.3d 989 (9th Cir. 2014), *cert. denied*, 135 S. Ct. 1452 (2015). *King Mountain* involved a Yakama-owned cigarette company that grew tobacco on the reservation, shipped it to Tennessee and North Carolina for processing and blending, then back to the reservation where it was made into cigarettes the company sold "throughout Washington and in about sixteen other states." *Id.* at 994. The company argued that Article III of the Treaty exempted it from paying escrow fees the State imposes on cigarette manufacturers. The Ninth Circuit rejected that reading: "the Treaty is not an express federal law that exempts King Mountain from state economic regulations." *Id.* at 994. The Ninth Circuit also held that there was no need to "engage in an exhaustive review of the meaning the Yakama would have given to the Treaty as of 1855" because "the relevant text of the Yakama Treaty is not ambiguous and the plain language of the Treaty does not provide a federal exemption from the Washington escrow statute." *Id.* at 994, 995.

The majority below dismissed *King Mountain*, asserting that "travel was not at issue" in that case. App. 13a. The majority reasoned that "[w]here trade does not involve travel on public highways, the right to travel provision in the treaty is not implicated." App. 13a. But, the majority concluded, "any trade, traveling, and importation that requires the use of public roads fall[s] within the scope of the right to travel provision of the treaty." App. 16a.

Chief Justice Fairhurst and Justice Wiggins dissented, finding that the majority's reasoning contradicted Ninth Circuit precedent and would create a giant hole "in Washington's ability to tax goods consumed within the state, without legal basis." App. 17a.

The dissent pointed out that the majority decision conflicted with the Ninth Circuit's rulings on the same treaty provision. The dissent explained that "*Smiskin* does not stand for the proposition the majority asserts—the Yakama Nation's treaty right to travel is a de facto right to trade simply because travel is necessary for trade. Indeed, a reading of *King Mountain* confirms the opposite to be true." App. 24a. "Travel was necessary for the trade at issue in *King Mountain*, yet the Ninth Circuit found the state obligation burdened only trade, rather than travel and, therefore, was not preempted by the Yakama Nation's treaty right to travel." App. 24a (citing *King Mountain*, 768 F.3d at 997-98).

The dissent also noted that King Mountain had made the same argument as Cougar Den, claiming that the treaty right to travel "'unequivocally prohibit[s] imposition of economic restrictions . . . on the Yakama people's Treaty right to . . . trade,'" which includes a treaty right to bring goods to market unrestrained by the laws of the states. App. 25a (alterations in original) (quoting *King Mountain*, 768 F.3d at 997). But the Ninth Circuit rejected it, holding the right to travel did *not* carry with it a right to avoid regulation or taxation of trade; it only "'guarantee[d] the Yakamas the right to transport goods to market over public highways without payment of fees for

that use.'" App. 25a (quoting *Cree v. Flores*, 157 F.3d at 769).

The dissent also pointed out the further conflict with *King Mountain*'s holding that the treaty language was unambiguous and could not be read to create a "right to trade" that preempted economic laws of the states. App. 25a. The dissent concluded that wholesale fuel excise taxes are indistinguishable from the tobacco escrow payments challenged in *King Mountain*, because neither burdened travel on highways and both imposed financial burdens on goods. App. 26a. This distinction could not be avoided simply by transporting goods because "[w]ithout travel, most goods have no market." App. 26a. "The necessity to bring its burdened goods to market did not entitle King Mountain to an exemption on its escrow obligation." App. 26a.

The dissent concluded that the majority "puts at risk . . . Washington's, and potentially other states', ability to tax goods consumed within its borders." App. 27a (citing avoidance of California fuel excise tax by a Yakama Indian fuel dealer). Moreover, "[n]othing indicates any of the parties understood the Treaty of 1855 to provide for such a right." App. 28a.

REASONS WHY THE PETITION SHOULD BE GRANTED

A. The Washington Supreme Court and Ninth Circuit Are Split on Whether this Treaty Creates a Right to Trade Without State Economic Regulation or Taxes

The Washington Supreme Court and the Ninth Circuit have addressed the same language

in the same treaty but reached completely different conclusions. The Ninth Circuit held that "the Treaty is not an express federal law that exempts [Yakama businesses] from state economic regulations," including taxes and state charges directed at goods sold by Yakamas. *King Mountain*, 768 F.3d at 994. Indeed, the Ninth Circuit held that the treaty language is unambiguous and leaves no room to rewrite it based on allegations about historical understandings. In contrast, the Washington Supreme Court, relying entirely on inferences and alleged historical understandings, held below that "any trade, traveling, and importation that requires the use of public roads" by the Yakama is exempt from taxation under the treaty. App. 16a. As a result, the state court granted Cougar Den an exemption from taxes on wholesale fuel that apply off-reservation and "regardless of whether Cougar Den uses the highway." App. 13a-14a. This genuine conflict and its significant impact on state revenues should be resolved by this Court.

1. The Ninth Circuit interprets this treaty to allow use of highways without paying "fees for that use" or advance notice, but not to preempt other taxes or regulations

The Ninth Circuit has interpreted the treaty language at issue here several times. It has held that the treaty preempts a state tax imposed *for using highways* and requirements that the Yakama obtain state approval prior to traveling, but that the treaty does not preempt other charges, taxes, or regulations directed at goods themselves, like those at issue here.

The Ninth Circuit first interpreted this treaty language in *Cree v. Waterbury*, 78 F.3d 1400, 1402 (9th Cir. 1996) ("No prior decision has interpreted the Treaty's highway right."). It rejected the district court's ruling that the meaning of Article III had already been determined in cases interpreting other sections of the treaty. *Id.* at 1403-04. It remanded to the district court for it "to examine the Treaty language as a whole, the circumstances surrounding the Treaty, and the conduct of the parties since the Treaty was signed in order to interpret the scope of the highway right." *Id.* at 1405.

The district court conducted that inquiry and the case returned to the Ninth Circuit in *Cree v. Flores*, 157 F.3d 762 (9th Cir. 1998). Based on extensive consideration of the treaty's language, *id.* at 769-72, and the district court's factual findings, *id.* at 772-73, the court held that the treaty right to travel on highways preempted "various Washington truck license and overweight permit fees," i.e., "fees imposed for use of the public highways," when Yakamas used highways to transport logs to off-reservation mills. *Id.* at 764, 768. The court explained that this "guarantee[d] the Yakamas the right to transport goods to market over public highways without payment of *fees for that use*." *Id.* at 769 (emphasis added).

The Ninth Circuit, however, quickly made clear that this treaty right was limited and did not extend even to federal highway taxes. In *Ramsey v. United States*, 302 F.3d 1074 (9th Cir. 2002), *cert. denied*, 540 U.S. 812 (2003), the United States had assessed Kip Ramsey (Cougar Den's owner) for unpaid taxes for using heavy trucks and diesel fuel on public highways

in his logging business. Ramsey challenged the taxes, invoking the right to travel provision and arguing that *Cree* controlled. The Ninth Circuit disagreed. The court held that a different approach to treaty interpretation applies depending on whether a state or federal tax is at issue. *Ramsey*, 302 F.3d at 1078. As to both types of tax, "tax laws applied to Indians outside of Indian country . . . are presumed valid absent express federal law to the contrary." *Id.* at 1077 (internal quotation marks omitted). With a federal tax, the court said, there must be "express exemptive language" in the treaty before the court even considers canons of construction to determine whether "the exemption applies to the tax at issue." *Id.* at 1079. By contrast, the court said, when a court evaluates a state tax, "there is no requirement to find express exemptive language *before* employing the canon of construction favoring Indians." *Id.* at 1079. Applying this standard, the court held that the treaty "contains no 'express exemptive language'" and thus creates no treaty right to avoid federal taxes on fuel used by trucks on the highway. *Id.* at 1080.[4]

The Ninth Circuit also limited its reasoning in the only other case in which it has found preemption of state law under the Article III right to travel on public highways. In *United States v. Smiskin*, 487 F.3d 1260 (9th Cir. 2007), the court held that the

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[4] The State is unaware of any other Circuit applying this rule that courts should take a different approach to interpreting treaties depending on whether a state or federal tax is at issue. Ultimately this idiosyncratic rule makes no difference to the conflict here, because the Washington Supreme Court's decision conflicts with the Ninth Circuit's approach even as to *state* taxes, as demonstrated by the *King Mountain* decision.

treaty guaranteed the Yakamas the right to travel on public highways without obtaining prior approval from the State. *Smiskin*, 487 F.3d at 1267. The court therefore held that the treaty barred prosecution of two Yakama members for transporting unstamped (i.e., untaxed) cigarettes without first notifying the State. *Id.* at 1267. Importantly, the *Smiskin* court never suggested that the treaty preempted state cigarette tax as to the Yakama, only that it preempted the requirement of providing notice in advance of using a highway. *See also United States v. Fiander*, 547 F.3d 1036 (9th Cir. 2008) (the treaty did not preempt prosecution of a Yakama for conspiring to violate federal law by agreeing to transport unstamped cigarettes in violation of state law, because the untaxed cigarettes were contraband).

The Ninth Circuit summarized and further clarified the scope of the treaty right in its most recent decision addressing Article III. In *King Mountain*, 768 F.3d 989, the court considered whether the treaty preempted a state fee that tobacco manufacturers had to pay on each unit of cigarettes they sold to help offset the long-term healthcare costs created by tobacco use. *Id.* at 991-92. King Mountain was a Yakama-owned tobacco manufacturer that engaged in extensive interstate trade as part of its manufacturing process, *id.* at 991, and it argued that Article III of the Treaty and *Smiskin* exempted it from paying into the escrow fund.

The Ninth Circuit emphatically rejected this argument. The court first underscored that regardless of whether a state or federal tax is at issue, the key question in assessing whether a treaty preempts a tax applied off-reservation is whether "an express federal

law" exempts the tribal "business from state regulation." *King Mountain*, 768 F.3d at 994. The court noted that because a state tax was at issue, it would consider canons of construction in assessing whether the treaty amounted to an "express federal law" exempting King Mountain from tax. *Id.* at 995. But it emphasized that "the canon of construction regarding the resolution of ambiguities in favor of Indians . . . does not permit reliance on ambiguities that do not exist; nor does it permit disregard of the clearly expressed intent of Congress." *Id.* (alterations in original) (quoting *South Carolina v. Catawba Indian Tribe, Inc.*, 476 U.S. 498, 506 (1986)). Applying this principle, the court found no need to "engage in an exhaustive review of the meaning the Yakama would have given to the Treaty as of 1855" because "the relevant text of the Yakama Treaty is not ambiguous and the plain language of the Treaty does not provide a federal exemption from the Washington escrow statute." *Id.* at 994, 995. While "the plain text of Article III . . . reserved to the Yakama the right 'to travel upon all public highways,'" nothing in the treaty's text created a "right to trade" free of state taxes or regulations. *Id.* at 997. Thus, no alleged "meaning to the Yakama people [could] overcome the plain and unambiguous text of the Treaty." *Id.* at 998. This Court denied certiorari after the Yakama Nation urged that the Ninth Circuit's reliance on language was contrary to this Court's precedent. *Confederated Tribes & Bands of the Yakama Indian Nation v. McKenna*, 135 S. Ct. 1542 (No. 14-947, Petition for Writ of Certiorari denied Mar. 9, 2015).

The Ninth Circuit has thus made clear its view of the limits to this treaty right, rooted in the Treaty's text. The Treaty guarantees Yakama members a "right to travel" that exempts them from paying state fees for using the highways or obtaining state approval to use the highways. *Cree v. Flores*, 157 F.3d at 764; *Smiskin*, 487 F.3d at 1264. But the Treaty is not an express federal law exempting the Yakama from taxes incidental to trade, even if the trade makes use of the highways, because the Treaty contains no "right to trade" free of taxes. *King Mountain*, 768 F.3d at 998; *Ramsey*, 302 F.3d at 1080. Under this reasoning, the Treaty would not preempt the wholesale fuel tax at issue here because, as even the majority below acknowledged, the tax applies "regardless of whether Cougar Den uses the highway." App. 13a-14a.[5]

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[5] District courts have consistently applied the Ninth Circuit view during the past decade. In *United States v. King Mountain Tobacco Co., Inc.*, No. 1:14-cv-3162-RMP, 2015 WL 4523642 (E.D. Wash. July 17, 2015), *appeal docketed*, No. 16-35956 (9th Cir. Nov. 17, 2016), the company objected to assessments under the federal Fair and Equitable Tobacco Reform Act. The court held that the assessments "do not constitute a 'restriction' or 'condition' on the use of public highways." *Id.* at *15. "[T]he Yakama Treaty does not guarantee the right to trade unencumbered." *Id.*

The same court also rejected, twice, the argument that a federal excise tax on tobacco interfered with "free access . . . to the nearest public highway" under the treaty, saying that the Yakama Indian was "not being taxed for using on-reservation roads. It is being taxed for manufacturing tobacco products." *King Mountain Tobacco Co., Inc. v. Alcohol & Tobacco Tax & Trade Bureau*, 996 F. Supp. 2d 1061, 1068 (E.D. Wash. 2014) (quoting *Ramsey*, 302 F.3d at 1076-77), 1069, *vacated on other grounds sub nom. Confederated Tribes & Bands of the Yakama*

2. The Washington Supreme Court creates a conflict by declaring that "any trade, traveling, and importation that requires the use of public roads" cannot be taxed

The Washington Supreme Court majority's view of the treaty is diametrically opposed to the Ninth Circuit's. This leads to its contrary result, holding that the State's wholesale fuel tax is preempted as to Cougar Den even though it is undisputed that the tax applies "regardless of whether Cougar Den uses the highway." App. 13a-14a.

The Washington court began its opinion by acknowledging that "[a]bsent express federal law to the contrary," Indians going beyond reservation boundaries are subject to non-discriminatory state taxes. App. 17a (quoting *Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 148-49 (1973)). And it recognized that the tax at issue here is non-discriminatory and its incidence is off-reservation. *Id.* at 4a-5a.

In finding that the Treaty amounted to "an express federal law" preempting state taxes, however, the court quickly skipped over the Treaty's actual language and went directly to exploring how the Yakama allegedly would have understood it

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Indian Nation v. Alcohol & Tobacco Tax & Trade Bureau, 843 F.3d 810 (9th Cir. 2016); *United States v. King Mountain Tobacco Co., Inc.*, No. CV-12-3089-RMP, 2014 WL 279574 (E.D. Wash. Jan. 24, 2014), *appeal docketed*, No. 14-36055 (9th Cir. Dec. 11, 2014); *see also Confederated Tribes & Bands of the Yakama Nation v. Gregoire*, 680 F. Supp. 2d 1258, 1267-68 (E.D. Wash. 2010) (rejecting claim that treaty preempts state taxes on cigarettes), *aff'd on other grounds*, 658 F.3d 1078 (9th Cir. 2011).

historically. App. at 5a. This was contrary to both this Court's approach (as explained in Part B, below) and the Ninth Circuit's. *See King Mountain*, 768 F.3d at 997 ("As shown by the plain text of Article III, the Treaty reserved to the Yakama the right 'to travel upon all public highways.' Nowhere in Article III is the right to trade discussed."); *Ramsey*, 302 F.3d at 1080 ("[T]here is no express exemptive language in the Treaty to exempt the Yakama from the generally applicable, federal heavy vehicle and diesel fuel taxes."); *Cree v. Flores*, 157 F.3d at 770 (trial court "evaluated the public highways clause on its own and in terms of the Treaty as a whole"); *Cree v. Waterbury*, 78 F.3d at 1403 ("To determine the parties' intent, the court must examine the treaty language as a whole, the circumstances surrounding the treaty, and the conduct of the parties since the treaty was signed."). Thus, the state court never mentioned that the treaty says nothing about a right to trade or to avoid taxes on goods, or any words suggesting an exception to future state or federal laws governing trade using highways. But by using this approach, untethered from text, the state court declared a treaty right far broader than any recognized by the Ninth Circuit: "any trade, traveling, and importation that requires the use of public roads fall[s] within the scope of the right to travel provision of the treaty." App. 16a.

The state court sought to justify its holding based on readings of Ninth Circuit opinions that are irreconcilable with those opinions and that the Ninth Circuit itself repudiates. The state court split from the Ninth Circuit's holdings in three crucial respects.

First, the Washington court cited *Cree* to assess the Yakamas' alleged understanding of the treaty and

to find an implied "right to trade" free of state taxes. App. 6a-9a. But the issue in *Cree* was limited to a tax imposed for using the highway. *Cree v. Flores*, 157 F.3d at 765. Here, the majority acknowledged that the tax is not for using the highway, but rather is for engaging in distribution and sale of wholesale fuel. App. 14a. As to this type of tax, which is not directly related to highway use, the Ninth Circuit has made clear that no resort to historical analysis is necessary because nothing in the treaty language can be interpreted as creating an exemption from such a tax. *King Mountain*, 768 F.3d at 994-95, 998.

Second, the state court made pervasive misuse of *Smiskin*. The state court relied on dicta in *Smiskin* describing a "right to travel outside reservation boundaries, *with no conditions attached*." App. 10a (citing *Smiskin*, 487 F.3d at 1266 (emphasis in *Smiskin*)). But the "condition" at issue in *Smiskin* was *not* taxation of cigarettes—the court never suggested that the State's taxes were invalid; the condition was requiring notice before using a highway. *Smiskin*, 487 F.3d at 1264 ("critical question" is whether applying state "pre-notification requirement to Yakama tribal members who possess and transport unstamped cigarettes violates the Yakama Treaty of 1855"); *King Mountain*, 768 F.3d at 998 (reading *Smiskin* as concerning a notice "requirement" that "imposes a condition on travel").[6] The state court treats this

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[6] *See also Confederated Tribes & Bands of the Yakama Nation v. Gregoire*, No. CV-08-3056-RHW, 2010 WL 9113878 (E.D. Wash. Order dated Nov. 9, 2010) (*Smiskin* held "only that the prenotification requirement in particular impermissibly infringed on Yakamas' right to travel"), *aff'd on other grounds*, 658 F.3d 1078 (9th Cir. 2011); App. 24a (dissent).

phrase in *Smiskin*, however, as though it declared a nearly infinite treaty right to avoid anything directed at trade while traveling, by holding that a tax or regulation of property transported over a highway is a "condition" on travel. App. 10a (quoting *Smiskin*).

The state court's strained reading of *Smiskin* cannot be reconciled with *King Mountain*, which rejected this same argument and held that paying escrow charges on cigarettes is not a "condition" or restriction on travel under the treaty. *King Mountain*, 768 F.3d at 997 (rejecting argument that *Smiskin* and *Cree* prohibit "imposition of economic restrictions or pre-conditions on the Yakama people's Treaty right to engage in the trade of tobacco products"). There is thus no merit to the state court majority's conclusion that "*Smiskin* is nearly identical to this case." App. 13a. Read fairly and in light of subsequent cases, *Smiskin* provides no support for the state court holding that a tax on wholesale fuel inventories is a "condition on travel that affect[s] the Yakamas' treaty right to transport goods to market without restriction." App. 13a.

The state court's final and most glaring conflict with Ninth Circuit precedent has to do with *King Mountain*. The Washington court quickly dispensed with *King Mountain*, opining that "[t]he difference between *Smiskin* and *King Mountain* is that in *King Mountain*, travel was not at issue." App. 13a. The Ninth Circuit opinion in *King Mountain* refutes that statement. "King Mountain ships its tobacco crop to Tennessee where it is threshed. Then the tobacco is sent to a factory in North Carolina where more tobacco is purchased and blended with reservation tobacco." *King Mountain*, 768 F.3d at 994. King

Mountain then has its tobacco "sent back to the reservation, where much of it is made into cigarettes. King Mountain sells its tobacco products throughout Washington and in about sixteen other states." *King Mountain*, 768 F.3d at 994.

If *King Mountain* did not sufficiently involve travel, then neither does this case, which involves simple importation of fuel from Oregon into Washington. The wholesale fuel tax and the charges and taxes on tobacco are equally directed to Yakama-owned goods transported over the same highways. Indeed, the majority opinion admitted that highway use is entirely incidental to the fuel tax because the tax applies "regardless of whether Cougar Den uses the highway." App. 13a. The majority then found the absence of taxation related to highway use "immaterial because, in this case, it was impossible for Cougar Den to import fuel without using the highway." App. 14a. The majority did not explain how this point distinguished this case from *King Mountain*, while the dissent pointed out how this was no distinction at all because virtually all goods require transportation to be marketed. App. 26a.

In short, under *King Mountain*, the Ninth Circuit would have upheld application of the State's wholesale fuel tax to Cougar Den. Yet the Washington court found the tax preempted and declared a far broader treaty right than the Ninth Circuit has ever recognized. This conflict warrants this Court's review. No other court can reconcile these starkly different results and eliminate the resulting harm to the State, its taxpayers, and its businesses facing the competitive disadvantage of tax avoidance by a Yakama business.

B. The Washington Supreme Court Decision Conflicts with this Court's Holdings on Construing Indian Treaties and Preemption of State Laws

The Washington Supreme Court ruling also warrants review because it conflicts with this Court's case law. First, it defies this Court's fundamental rule that state taxes and regulations apply to Indians outside reservation boundaries absent an express federal law providing for preemption. Second, it contradicts this Court's long-standing rules for interpreting Indian Treaties because the state court relied on subjective inferences about historical understanding to supply a right that does not exist in the treaty language itself.

"Absent express federal law to the contrary, Indians going beyond reservation boundaries have generally been held subject to non-discriminatory state law otherwise applicable to all citizens of the State." *Mescalero*, 411 U.S. at 148-49; *Michigan v. Bay Mills Indian Cmty.*, 134 S. Ct. 2024, 2034 (2014) ("Unless federal law provides differently, Indians going beyond reservation boundaries are subject to any generally applicable state law." (internal quotation marks omitted) (citing *Wagnon v. Prairie Band Potawatomi Nation*, 546 U.S. 95, 113 (2005))).

This principle applies with special force to tax laws. Tribes and their members are subject to generally applicable off-reservation taxes "[a]bsent a 'definitely expressed' exemption." *Mescalero*, 411 U.S. at 156 (quoting *Choteau v. Burnet*, 283 U.S. 691, 696 (1931)). "[T]ax exemptions are not granted by

implication." *Mescalero*, 411 U.S. at 156 (quoting *Oklahoma Tax Comm'n v. United States*, 319 U.S. 598, 606 (1943)). They must be "clearly expressed." *Chickasaw Nation v. United States*, 534 U.S. 84, 95 (2001) (citing *United States v. Wells Fargo Bank*, 485 U.S. 351, 354 (1988) ("[E]xemptions from taxation . . . must be unambiguously proved")). This rule is not merely a tool of interpretation; it is a critical "bright-line standard" "to ensure efficient tax administration" by the states. *Wagnon*, 546 U.S. at 113.

The Washington Supreme Court cited this rule in passing, but gave it no effect. App. 4a-5a (citing *Mescalero*, 411 U.S. at 148). The majority noted that "[a] treaty constitutes an express federal law," App. 4a, but that truism ignores that the relevant question is what the treaty Congress ratified actually says. And the majority never explained how the Yakamas' "right, in common with citizens of the United States, to travel upon all public highways," could possibly create an "express exemption" from a wholesale fuel tax that even the majority acknowledged "is assessed regardless of whether Cougar Den uses the highway." App. 13a-14a. The conflict with this Court's "express exemption" requirement is palpable.

The Washington court also departed from this Court's case law by relying upon the claimed historical understanding of the Yakama in order to read into the treaty a right to avoid taxation that does not exist anywhere in the treaty language itself. *Choctaw Nation of Indians v. United States*, 318 U.S. 423, 432 (1943); *see also Oklahoma Tax Comm'n v. Chickasaw Nation*, 515 U.S. 450, 466 (1995) ("liberal construction cannot [overcome] a clear geographic limit in the Treaty"). Only if language is ambiguous will this

Court seek to construe it "in accordance with the tenor of the treaty," while "stop[ping] short of varying its terms to meet alleged injustices." *Northwest Bands of Shoshone Indians v. United States*, 324 U.S. 335, 353 (1945).

The Ninth Circuit has correctly held that this treaty unambiguously includes no right to engage in tax-free trade. *King Mountain*, 768 F.3d at 998. But the Washington Supreme Court layered inference on top of implication in finding such a right "[b]ased on the historical interpretation of the Tribe's essential need to travel extensively for trade purposes." App. 16a. This is precisely the type of rewriting of a treaty based on inferred understandings this Court uniformly rejects. This rewriting based on alleged historical understanding is particularly troubling given that for at least 125 years after the treaty was signed, neither party to the treaty interpreted it the way the Washington Supreme Court now has. Prior to 1980, neither the Yakama Tribe nor any of its members had claimed a right to transport goods via public highways free of state taxation. *Yakima Indian Nation v. Flores*, 955 F. Supp. 1229, 1254-55 (E.D. Wash. 1997). And the United States still rejects such an understanding. When it opposed certiorari in *Ramsey v. United States*, No. 02-1547 (denied Oct. 6, 2003), the government rebutted Yakama arguments that a right to engage in tax-free interstate trade

could be found anywhere in the treaty, disclaiming a historical understanding of tax-free highway trading.[7]

The bottom line is that the Washington court found a tax exemption based not on any express exemption, but on inferences about alleged understandings that bear no relation to the treaty's text. Based on the tribe's "right, in common with citizens of the United States, to travel upon all public highways," the court found an exemption from wholesale fuel taxes even when no Yakama member had traveled on a public highway to transport the fuel and even though the tax applies regardless of whether the fuel is transported by highway. This is not an "express exemption," and no textual ambiguity justifies this untenable reading. The Court should grant the petition to address these conflicts with its precedent.

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[7] In *Ramsey*, the United States Brief in Opposition pointed out that the Yakama argument claiming avoidance of taxation was contrary to the "settled principle" "that exemptions from taxation are not to be implied; they must be unambiguously proved" even in the context of an Indian treaty. BIO at 7 (quoting *United States v. Wells Fargo Bank*, 485 U.S. 351, 354 (1988)) (citing *United States Trust Co. v. Helvering*, 307 U.S. 57, 60 (1939) ("Exemptions from taxation do not rest upon implication.")). It pointed out that *Mescalero* applied to the treaty, because there was no language to create any right to avoid diesel taxes. BIO at 7. "The treaty does *not* refer to taxation at all." BIO at 8 (emphasis in original). "In providing the Yakama a right 'in common with citizens of the United States,' the treaty *expressly* gives the Yakama a right equal to, not superior to, the right of other citizens to travel on public highways." BIO at 9 (emphasis in original). As noted above, these observations apply equally to this case.

C. The Question Presented Is Important Because It Concerns the Critical State Power of Taxation

This Court has long recognized the critical importance of state taxing powers. "It is upon taxation that the several States chiefly rely to obtain the means to carry on their respective governments, and it is of the utmost importance to all of them that the modes adopted to enforce the taxes levied should be interfered with as little as possible." *Dows v. City of Chicago*, 78 U.S. 108, 110 (1870). The enormous tax consequences of this case call out for this Court's immediate review. The $3.6 million in state revenues directly at issue in this case covers only taxes incurred during a seven month period in 2013. But the outcome of this case will control tens of millions in additional taxes that have been assessed against Cougar Den for later tax periods, in addition to taxes payable by similarly situated Yakama businesses. The harm to Washington taxpayers from this ruling will easily top hundreds of millions in the near future.

This issue matters beyond Washington because Cougar Den has demonstrated its intent to engage in fuel tax avoidance in other states. Cougar Den has obtained or is seeking fuel exporter licenses in Idaho (license number 004673649), Nevada (license number MCEX00046868), and Washington (application pending). Such licenses will permit it to obtain untaxed fuel for transport to lucrative markets in other states, where it will undoubtedly refuse to pay the tax imposed by the state where its fuel is

wholesaled. This includes markets such as southern California, where on-reservation retailers have already taken advantage of Yakama-supplied tax-free fuel. App. 28a-29a. In a short time, this state court ruling will allow a Yakama member to evade this Court's holding in *Wagnon*, with the potential to harm every state with wholesale fuel taxes like the Kansas tax upheld there. Without prompt review, states will lose critical revenues during disputes or relitigate the same legal question in other forums, wasting State and judicial resources.

Moreover, fuel taxes are not the only taxes likely affected by the ruling below. The Washington court held that "any trade, traveling, and importation that requires the use of public roads fall[s] within the scope of the right to travel provision of the treaty." App. 16a. Thus, any good that the Yakamas transport (or contract to have transported, as here) is now potentially exempt from state taxation, at least if the tax is litigated in state court. This Court has recognized that "tax administration requires predictability." *Oklahoma Tax Comm'n*, 515 U.S. at 459-60. This ruling guarantees unpredictability.

This unpredictability will also extend beyond Washington, because Yakama businesses have already cited the Treaty to avoid taxes as to other (non-fuel) products in other states. *See, e.g.*, *New York v. King Mountain Tobacco Co.*, 953 F. Supp. 2d 385, 391 (E.D.N.Y. 2013) (noting defendant's argument that Yakama Treaty forecloses New York's regulatory

authority over defendant Yakama cigarette maker). And the same treaty language is found in treaties with at least two tribes in other states. Treaty With the Nez Percés, art. III, ¶ 1, 12 Stat. 957, 958 (June 11, 1855, ratified Mar. 8, 1859, proclaimed Apr. 29, 1859); Treaty With the Flatheads, art. III, ¶ 1, 12 Stat. 975, 976 (July 16, 1855, ratified Mar. 8, 1859, proclaimed Apr. 18, 1859).

Given the hundreds of millions of dollars at stake for Washington, the uncertainty this ruling creates as to other taxes, and the threats to other States, this Court should promptly review the Washington Supreme Court's extraordinary holding.

D. This Case Provides a Perfect Vehicle to Determine if the Yakama Treaty Creates a Right to Avoid Taxes on Goods Shipped over Public Highways

There is no vehicle problem that would interfere with this Court's resolution of this case. The state court ruling is limited to one issue: the federal question regarding the meaning of the treaty. App. 4a. Because its decision is based on a summary judgment record and previously decided cases, the issues in this case are entirely questions of law. *See Houchins v. KQED, Inc.*, 429 U.S. 1341, 1342-43 (1977) (interpretation of prior judicial rulings presents a question of law). Moreover, this Court's ruling would entirely resolve this case: the state court agreed that, but for this alleged treaty right, the tax indisputably applies. App. 5a. The Court would thus be able to decide cleanly the important question whether the treaty language creates an exemption from off-

reservation taxes for Yakama-owned businesses using the public highways.

CONCLUSION

The Washington Supreme Court's decision creates a clear conflict with decisions of the Ninth Circuit and this Court, will have enormous financial implications for Washington and other States, and offers a perfect opportunity to address the question presented. The Court should grant certiorari.

RESPECTFULLY SUBMITTED.

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June 14, 2017

APPENDIX

FILE
IN CLERKS OFFICE
SUPREME COURT, STATE OF
WASHINGTON
MAR 16 2017
s/ Fairhurst, J.
CHIEF JUSTICE

This opinion was filed for record
at 8:00 am on March 16, 2017
s/ Susan L. Carlson
SUSAN L. CARLSON
SUPREME COURT CLERK

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

COUGAR DEN, INC., a Yakama Nation corporation, Respondent, v. WASHINGTON STATE DEPARTMENT OF LICENSING, Appellant.	No. 92289-6 En Banc Filed MAR 16 2017

JOHNSON, J.—Article III of the Yakama Nation Treaty of 1855 provides in pertinent part:

> [I]f necessary for the public convenience, roads may be run through the said reservation; and on the other hand, the right of way, with free access from the same to the nearest public highway, is secured to them; as also the right, in common with citizens of the United States, to travel upon all public highways.

Treaty with the Yakamas, 12 Stat. 951, 952-53 (1855).

The issue in this case centers on the interpretation of the "right to travel" provision in the treaty, in the context of importing fuel into Washington State. The Washington State

Department of Licensing (Department) challenges Cougar Den Inc.'s importation of fuel without holding an importer's license and without paying state fuel taxes under former chapter 82.36 RCW, *repealed by* Laws of 2013, ch. 225, § 501, and former chapter 82.38 RCW (2007).

An administrative law judge (ALJ) ruled in favor of Cougar Den, holding that the right to travel on highways should be interpreted to preempt the tax. The Department's director, Pat Kohler, reversed. On appeal, the Yakima County Superior Court reversed the director's order and ruled in favor of Cougar Den. We affirm.

FACTS AND PROCEDURAL HISTORY

Cougar Den is a Confederated Tribes and Bands of the Yakama Nation (Yakama Nation) corporation that transports fuel from Oregon to the Yakama Indian Reservation, where it is sold. Kip Ramsey, Cougar Den's owner and president, is an enrolled member of the Yakama Nation.

Cougar Den began transporting fuel in 2013 from Oregon to the Yakama Indian Reservation. Cougar Den contracted with KAG West, a trucking company, to transport the fuel into Washington from March 2013 to October 2013.

On December 9, 2013, the Department issued assessment number 756M against Cougar Den, demanding $3.6 million in unpaid taxes, penalties, and licensing fees for hauling the fuel across state lines. Cougar Den appealed the assessment to the Department's ALJ, who held in his initial order that the assessment was an impermissible restriction

under the treaty. The Department sought review of the ALJ's initial order. Upon review, the director of the Department reversed the ALJ and entered findings of fact and conclusions of law.

The director held that the Yakama treaty did not preempt the taxes, license requirements, and penalties sought against Cougar Den. Cougar Den then petitioned for review of the final order by the Department. The Yakima County Superior Court, sitting in an appellate capacity, reversed the director's order and held that the taxation violated the tribe's right to travel. The Department appealed the superior court's decision and sought direct review under RAP 4.2(a)(2). We granted direct review.

ANALYSIS

This case began as a challenge to an administrative order; therefore, review is governed by chapter 34.05 RCW. Under that statute, in relevant part, we review to determine whether the decision is an erroneous interpretation or application of the law.[1] Generally, an "'agency decision is presumed correct and the challenger bears the burden of proof.'" *King County Pub. Hosp. Dist. No. 2 v. Dep't of Health*, 178 Wn.2d 363, 372, 309 P.3d 416 (2013) (quoting *Providence Hosp. of Everett v. Dep't of Soc. & Health Servs.*, 112 Wn.2d 353, 355, 770 P.2d 1040 (1989)).

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[1] "Review of agency orders in adjudicative proceedings. The court shall grant relief from an agency order in an adjudicative proceeding only if it determines that:

" . . . .

"(d) The agency has erroneously interpreted or applied the law." RCW 34.05.570(3)(d).

However, this case involves a treaty interpretation, which is a legal question reviewed de novo. *Chi. Title Ins. Co.* v. *Office of Ins. Comm'r,* 178 Wn.2d 120, 133, 309 P.3d 372 (2013) ("The agency's interpretation of pure questions of law is not accorded deference." (citing *Hunter v. Univ. of Wash.*, 101 Wn. App. 283, 292, 2 P.3d 1022 (2000))). This court sits in the same position as the superior court, reviewing the standards of the Washington Administrative Procedure Act, chapter 34.05 RCW, directly to the record established before the agency.

Washington State law imposes a tax on fuels used for the propulsion of motor vehicles on the highways of the state. In 2013, when Cougar Den transported fuel into the state, chapter 82.36 RCW governed taxes on motor vehicle fuel, or gasoline, and former chapter 82.38 RCW governed taxes on "special fuel," which includes diesel fuel.[2] Fuel taxes are imposed at the wholesale level, when fuel is removed from the terminal rack or imported into the state. Former RCW 82.36.020(2) (2007); former RCW 82.38.030(7) (2007).

The Yakama Indian Reservation is a federally recognized Indian tribal reservation located within the state of Washington. Outside an Indian reservation, Indian citizens are subject to state tax laws, "[a]bsent express federal law to the contrary." *Mescalero Apache Tribe v. Jones,* 411 U.S. 145, 148, 93 S. Ct. 1267, 36 L. Ed. 2d 114 (1973). A treaty constitutes an express federal law. There is no dispute that the taxes and licensing requirements would

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[2] In 2013, Governor Jay Inslee signed House Bill 1883, which repealed chapter 82.36 RCW and combined it with chapter 82.38 RCW. H.B. 1883, 63d Leg., Reg. Sess. (Wash. 2013).

apply if the treaty provision does not apply here. However, Cougar Den asserts that the right to travel provision in the treaty precludes the State from demanding unpaid taxes, penalties, and licensing fees for hauling the fuel across state lines (relying on treaty language that "the right of way . . . is secured to them . . . to travel upon all public highways").

The United States Supreme Court has established a rule of treaty interpretation: Indian treaties must be interpreted as the Indians would have understood them.

> The Indian Nations did not seek out the United States and agree upon an exchange of lands in an arm's-length transaction. Rather, treaties were imposed upon them and they had no choice but to consent. As a consequence, this Court has often held that treaties with the Indians must be interpreted as they would have understood them.

Choctaw Nation v. Oklahoma, 397 U.S. 620, 630-31, 90 S. Ct. 1328, 25 L. Ed. 2d 615 (1970).

> It is our responsibility to see that the terms of the treaty are carried out, so far as possible, in accordance with the meaning they were understood to have by the tribal representatives at the council, and in a spirit which generously recognizes the full obligation of this nation to protect the interests of a dependent people.

Tulee v. Washington, 315 U.S. 681, 684-85, 62 S. Ct. 862, 86 L. Ed. 1115 (1942).

The Ninth Circuit has recognized this rule of treaty construction. *See United States v. Smiskin*, 487 F.3d 1260, 1264 (9th Cir. 2007); *Cree v. Flores*, 157

F.3d 762, 769 (9th Cir. 1998) (*Cree* II). Treaties are broadly interpreted, with doubtful or ambiguous expressions resolved in the Indians' favor.

The Department argues that Cougar Den's reading of the right to travel provision is overly broad. It asserts that the Ninth Circuit cases involving the right to travel forbid the State from specifically restricting the right to travel on a highway, but allow the State to restrict or regulate a specific good that is incidentally brought over a highway. The Department argues that the treaty does not preempt Washington State fuel taxes in this case. Both parties here support their arguments by citing several Ninth Circuit cases.

The Department's interpretation of the treaty provision ignores the historical significance of travel to the Yakama Indians and the rule of treaty interpretation established by the United States Supreme Court. In ruling in Cougar Den's favor, both the ALJ and the Yakima County Superior Court based their decisions on the history of the right to travel provision of the treaty, relying on the findings of fact and conclusions of law from *Yakama Indian Nation v. Flores*, 955 F. Supp. 1229 (E.D. Wash. 1997).

The factual record regarding the treaty interpretation of the historical meaning of the right to travel relied on below was developed in a federal action, *Cree* II.[3] Because the rule of treaty

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[3] This *Cree* case began in the federal district court as *Cree v. Waterbury*, 873 F. Supp. 404 (E.D. Wash. 1994), appealed to the Ninth Circuit, then remanded for factual development in *Yakama Indian Nation*. *Cree v. Waterbury (Cree* I), 78 F.3d 1400 (9th Cir. 1996). In *Yakama Indian Nation*, the court undertook "a 'factual investigation into the historical context and parties'

interpretation requires that treaties be read as the Indians would have understood them, the district court conducted an extensive factual inquiry regarding the treaty and the historical context of the right to travel provision. The court determined that the treaty and the right to travel provision in particular was of tremendous importance to the Yakama Nation at the time the treaty was signed. Travel was woven into the fabric of Yakama life in that it was necessary for hunting, gathering, fishing, grazing, recreational, political, and kinship purposes. Importantly, at the time, the Yakamas exercised free and open access to transport goods as a central part of a trading network running from the western coastal tribes to the eastern plains tribes. The court found that the record unquestionably depicted a tribal culture whose manner of existence was dependent on the Yakamas' ability to travel. *Yakama Indian Nation*, 955 F. Supp. at 1239.

At the time the treaty was drafted, agents of the United States knew of the Yakamas' reliance on travel. During negotiations, the Yakamas' right to travel off reservation had been repeatedly broached, and assurances were made that entering into the treaty would not infringe on or hinder their tribal practices. Promises were made to protect the Indians

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intent at the time the Treaty was signed [in order to] determine the precise scope of the highway right,'" and "'examine[d] the Treaty language as a whole, the circumstances surrounding the Treaty, and the conduct of the parties since the Treaty was signed in order to interpret the scope of the highway right."' *Yakama Indian Nation*, 955 F. Supp. at 1234, 1235 (quoting *Cree* I, 78 F.3d at 1403, 1405). After completing extensive investigation, it entered findings of fact and conclusions of law.

from "'bad white men"' if the tribes agreed to live within designated reservations. *Yakama Indian Nation*, 955 F. Supp. at 1243. Agents of the United States thus repeatedly emphasized in negotiations that tribal members would retain the "'same liberties . . . *to go on the roads to market.*"' *Yakama Indian Nation*, 955 F. Supp. at 1244. The court further determined that "both parties to the treaty expressly intended that the Yakamas would retain their right to travel outside reservation boundaries, with no conditions attached." *Yakama Indian Nation*, 955 F. Supp. at 1251. The treaty was presented as a means to preserve Yakama customs and protect against further encroachment by white settlers. There was no mention of any sort of restriction on hunting, fishing, or travel other than the condition that the government be permitted to construct wagon roads and a railroad through the reservation. Finally, the court found that "the Treaty was clearly intended to reserve to the Yakamas' right to travel on the public highways to engage in *future* trading endeavors." *Yakama Indian Nation*, 955 F. Supp. at 1253.

In reliance on these vital promises, the Yakamas forever ceded 90 percent of their land in exchange for these rights. Yakama Nation thus understandably assigned a special significance to each part of the treaty at the time of the signing and continues to view the treaty as a sacred document today. It is important to note that although the United States negotiated with many Northwest tribes, only the treaties with the Yakamas and Nez Perce contained highway clauses like this one. *Cree* II, 157 F.3d at 772.

With the historical importance of the right to travel in mind, on review, the Ninth Circuit adopted the findings and treaty interpretation from the district court and held that the treaty exempted the Yakama Indians from various Washington truck license and overweight permit fees. In that case, the plaintiff, Yakama Indian Nation, sold timber and hauled logs from within reservation lands to off-reservation mills. Defendants were state officers authorized to issue traffic citations for violations of state vehicle registration, licensing, and permitting statutes. Plaintiff brought suit after the officers issued citations for violation of these statutes. In determining whether the treaty exempted Yakama Indian Nation from the fees, the court considered the historical context of the treaty and recognized the significance of travel to the Yakamas. The court agreed with the district court's finding that the treaty secured for the Yakamas' the right to use future roads and to *trade* their goods. The court held that the treaty exempted the tribe from truck license and permitting fees. *Cree* II, 157 F.3d at 774.

Nine years later, the Ninth Circuit considered the right to travel in another context in *Smiskin*. In that case, agents of the federal Bureau of Alcohol, Tobacco, Firearms and Explosives suspected the Smiskins, members of Yakama Nation, of transporting unstamped cigarettes from smoke shops on an Idaho Indian reservation to smoke shops on various Indian reservations in Washington. In June 2004, the agents seized 4,205 cartons of unstamped cigarettes from the Smiskins' residence and charged them with violating the federal contraband cigarette trafficking act (CCTA),

18 U.S.C. § 2342(a). Under the CCTA, it is "unlawful for any person knowingly to ship, transport, receive, possess, sell, distribute, or purchase contraband cigarettes." 18 U.S.C. § 2342(a). "'[C]ontraband cigarettes' means a quantity in excess of 10,000 cigarettes, which bear no evidence of the payment of applicable State or local cigarette taxes in the State or locality where such cigarettes are found." 18 U.S.C. § 2341(2).

Washington State requires wholesalers to affix either a "tax paid" or "tax exempt" stamp to cigarette packaging prior to sale. *See* RCW 82.24.030. Individuals other than licensed wholesalers may transport unstamped cigarettes only if they have "given notice to the [Washington State Liquor Control Board] in advance of the commencement of transportation." RCW 82.24.250(1). The Smiskins did not provide notice to the State prior to transporting unstamped cigarettes; therefore, the cigarettes were unauthorized under state law. As a result, the Smiskins' possession and transportation of the contraband cigarettes was alleged to violate the terms of the CCTA.

Again, to determine whether the treaty precluded the State from prosecuting the Smiskins' violation of the State's prenotification requirement, the Ninth Circuit looked to the right to travel provision of the treaty. The court held that the Smiskins were not required to notify anyone prior to transporting goods to market because the treaty "'expressly intended that the Yakamas would retain their right to travel outside reservation boundaries, *with no conditions attached.*'" *Smiskin*, 487 F.3d at 1266 (quoting *Yakama Indian Nation*, 955 F. Supp. at

1251). It held that applying a prenotification requirement was a condition on travel that violated the Yakamas' treaty right to transport goods to market without restriction.

The court noted the "tremendous importance" of the right to travel provision and "refuse[d] to draw what would amount to an arbitrary line between travel and trade." *Smiskin*, 487 F.3d at 1265-66. "[W]hether the goods at issue are timber or tobacco products, the right to travel overlaps with the right to trade under the Yakama Treaty such that excluding commercial exchanges from its purview would effectively abrogate our decision in *Cree* II and render the Right to Travel provision truly impotent." *Smiskin*, 487 F.3d at 1266-67 (footnote omitted).

Of importance in the decision is the court's discussion of the regulatory exception. In resolving conflicts between state laws and Indian treaties, the United States Supreme Court has stated that pure regulatory restrictions may be validly applied to tribal members. The State in *Smiskin* argued that the State's tax collection effects had a regulatory purpose. However, the court found that Washington's stated purpose for requiring cigarette stamps, and hence for requiring notice before unstamped cigarettes are transported within the State, was to "'enforce collection of the tax hereby levied.'" *Smiskin*, 487 F.3d at 1269 (quoting RCW 82.24.030(1)). The court rejected the State's arguments and held that the treaty protected the activity.

More recently, in 2014, the Ninth Circuit addressed the right to travel provision again. The

Department relies on *King Mountain Tobacco Co. v. McKenna*, 768 F.3d 989 (9th Cir. 2014), to assert that the trial court interpreted the right to travel provision too broadly. In *King Mountain*, the plaintiff was a private tobacco company owned by Delbert Wheeler, an enrolled member of the Yakama Nation. King Mountain sought relief from application of Washington's escrow statute, which required King Mountain to place money into escrow to reimburse the State for health care costs related to the use of tobacco products. The court analyzed the treaty again and held that the plain text reserved to the Yakamas the right "'to travel upon all public highways,'" not the "right to trade." *King Mountain*, 768 F.3d 997, 998 (quoting 12 Stat. 953). The court distinguished *King Mountain* from the *Cree* cases by noting that the *Cree* cases involved "the right to travel (driving trucks on public roads) for the purpose of transporting goods to market." *King Mountain*, 768 F.3d 998. The court affirmed judgment in favor of the State and rejected King Mountain's reliance on the treaty right to travel.

The Department argues that this case is analogous to *King Mountain* because both companies "claim[] a right to engage in *trade* in addition to or above and beyond a right to travel upon the highways." Appellant's Opening Br. at 27. The Department asserts that Cougar Den is not facing a tax for "'using public highways. . . . [Rather, it] is being taxed for importing fuel.'" Appellant's Opening Br. at 27 (quoting Clerk's Papers at 1008). The Department argues that Cougar Den relies "heavily on dicta" in *Smiskin*. Appellant's Opening Br. at 29. The Department

argues that in *Smiskin*, the State restricted the right to travel on the highway, whereas here, the State is regulating fuel. The Department argues, and the Director agreed, that the taxes are assessed based on incidents of ownership or possession of fuel, and not incident to use of or travel on the roads or highways. It distinguishes *Smiskin* by asserting that Cougar Den does not need a fuel importer license in order to use public highways. "Rather, Cougar Den needs a fuel importer license to engage in business as a fuel trader." Appellant's Opening Br. at 30. The "tax applies without regard to travel on a highway," and "Cougar Den happens to hire trucks," but "[t]he tax is not a condition or restriction on Cougar Den's use of highways." Appellant's Opening Br. at 30, 31. It argues that the tax is imposed at the border and is assessed regardless of whether Cougar Den uses the highway.

The Department's argument is unpersuasive. *Smiskin* is nearly identical to this case. In both cases, the State placed a condition on travel that affected the Yakamas' treaty right to transport goods to market without restriction. The difference between *Smiskin* and *King Mountain* is that in *King Mountain*, travel was not at issue. In *King Mountain*, the court held under the facts that "there is no right to trade in the Yakama Treaty." *King Mountain*, 768 F.3d at 998. Where trade does not involve travel on public highways, the right to travel provision in the treaty is not implicated. Here, travel on public highways is directly at issue because the tax was an importation tax. The fact that the tax is imposed at the border and is assessed regardless of whether Cougar Den uses the

highway is immaterial because, in this case, it was impossible for Cougar Den to import fuel without using the highway.

In addition, the tax does not, as the State argues, fall under the regulatory exception. In *Smiskin,* the purpose of the notice requirement was the collection of taxes on the transported goods. The prenotification requirement was triggered by the transportation of cigarettes into the state. Likewise, here, the Department requires that companies obtain a license prior to hauling goods into the state: the purpose of the licensing requirement is to collect taxes. We hold that the right to travel provision in the treaty protects the Tribe's historical practice of using the roads to engage in trade and commerce.

Finally, the Department argues that applying the Ninth Circuit's reasoning would lead to "unimagined and unintended preemption of fundamental state powers." Appellant's Opening Br. at 32. The Department noted that the superior court's reasoning "could allow Yakama tribal members to avoid state laws that regulate goods by simply contriving to possess the goods on public highways." Appellant's Opening Br. at 33. An example the Department gave was that Yakama tribal members could avoid the law barring a felon from possessing a firearm simply because by traveling on a public highway, the treaty preempts state law. This same argument was made by the Defendants in *Smiskin*: if affirmed, the court's ruling would "preclude the State of Washington and the federal government from regulating tribal transportation of other 'restricted goods,' such as illegal narcotics and 'forbidden fruits [and] vegetables.'" *Smiskin*, 487 F.3d

at 1270-71 (alteration in original). The Ninth Circuit rejected this argument, observing that the concern was "unfounded, if not disingenuous." *Smiskin,* 487 F.3d at 1271. Laws with a purely regulatory purpose can be validly applied. In addition, the Ninth Circuit quoted the Yakama Nation and its amicus brief:

> "The Yakama Nation is a sovereign nation, with its own government, laws and courts, not a rogue organization or menace to civil order. The Yakama Nation does not and never has asserted that its members have a right under its treaty to traffic in narcotics. For the government of the United States to be suggesting otherwise is irresponsible.
>
> "The Yakama Nation must and will intercede as litigant or *amicus* to protect its members' treaty right to travel when the federal government overreaches, as it has here. But the Nation has no interest in promoting, condoning, or protecting activities by its members that pose real dangers to public health, public safety, natural resources, or public infrastructure. The Nation has no such interest not only because irresponsible overreaching on its part would likely prompt Congress to exercise its constitutional/ political power to abrogate or limit the treaty right to travel, but also because the Yakama Nation and its members share the interest all citizens have in public health, public safety, conservation and equitable exploitation of natural resources, and adequate public infrastructure."

Smiskin, 487 F.3d at 1271. We agree.

We also note that this case does not present the "parade of horribles" concern raised by the State. In interpreting the treaty, we are bound to read the provisions as the Tribe understood them. As noted, the right to travel provision appears to be unique to the Yakama and Nez Perce tribes. If the State has concerns about this treaty provision, only Congress can revise or restrict the provisions, not this court.

As determined by the federal courts, any trade, traveling, and importation that requires the use of public roads fall within the scope of the right to travel provision of the treaty. The Department taxes the importation of fuel, which is the transportation of fuel. Here, it was simply not possible for Cougar Den to import fuel without traveling or transporting that fuel on public highways. Based on the historical interpretation of the Tribe's essential need to travel extensively for trade purposes, this right is protected by the treaty.[4]

We affirm.

s/ Johnson, J.

WE CONCUR:

s/ Owens, J.

s/ González, J.

s/ Madsen, J.

s/ McLeod, J.

s/ Stephens, J.

s/ Yu, J.

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[4] Cougar Den also asserts that the director of the Department violated the appearance of unfairness doctrine. The Department counters by arguing that Cougar Den failed to raise the issue; therefore, the appellate court cannot entertain disqualification claims. This claim does not need to be addressed because the merits of the claim are reviewed de novo by this court. And, under either result here, the director will have no future role.

A. No. 92289-6

FAIRHURST, C.J. (dissenting)—Washington' s fuel excise tax burdens trade—the first instance of *wholesale possession* of fuel within Washington—not fuel transport. The Confederated Tribes and Bands of the Yakama Nation's (Yakama Nation) "right . . . to travel," as described in article III of their treaty, *Treaty with the Yakamas*, 12 Stat. 951, 953 (1855) (treaty right to travel), is not a right to trade. The majority's holding, if taken to its logical conclusion, would create a hole, bigger than that required to drive a tanker truck, in Washington's ability to tax goods consumed within the state, without legal basis. Therefore, I respectfully dissent.

I. ANALYSIS

"Absent express federal law to the contrary, Indians going beyond reservation boundaries have generally been held subject to nondiscriminatory state law." *Mescalero Apache Tribes v. Jones*, 411 U.S. 145, 148-49, 93 S. Ct. 1267, 36 L. Ed. 2d 1114 (1973). This includes state fuel excise taxes. *Wagnon v. Prairie Band Potawatomi Nation*, 546 U.S. 95, 97, 126 S. Ct. 676, 163 L. Ed. 2d 429 (2005) The majority holds that the treaty right to travel preempts Washington's motor vehicle fuel excise tax, former chapter 82.36 RCW (2007), *repealed by* Laws of 2013, ch. 225, § 501, and special fuel excise tax, former chapter 82.38 RCW (2007), *amended by* Laws of 2013, ch. 225, § 501.[1] As a result, it finds Cougar Den Inc.'s

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[1] The distinction between motor vehicle fuel and special fuel, which includes diesel fuel, was removed effective July 1, 2015. The statute was simplified and recodified into chapter 82.38 RCW. Laws of 2013, ch. 225, § 501. Previously, taxes were

off-reservation fuel importation activities exempt from Washington's fuel excise tax regime. I disagree and, therefore, respectfully dissent.

A. Former chapters 82.36 and 82.38 RCW represent a tax on the *wholesale possession*, not transportation, of fuel

The majority reaches its holding after finding that Washington's fuel excise tax regime "taxes the importation of fuel, which is the transportation of fuel." Majority at 16. But "import," as used here, is a term of art not requiring transportation of any kind. Former RCW 82.36.010(10); former RCW 82.38.020(12). "Import" is defined as "bring[ing] . . . fuel into this state," other than through a "pipeline or vessel" operated by a "licensee" and bound for a "terminal" or "refinery," unless located in "the fuel supply tank of a motor vehicle." Former RCW 82.36.010(3), (4), (10), .020(2)(c); former RCW 82.38.020(4), (5), (12), .030(7)(c). Further, the tax is levied "at the time and place of the first taxable event and upon the first taxable person within this state." Former RCW 82.36.022; former RCW 82.38.031. The statutory language alone demonstrates the clear intent of the legislature—to levy an excise tax on the first instance of *wholesale possession* of fuel not distributed through a refinery or importation terminal within the state. Whether

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separately imposed on motor vehicle fuel, special fuel, and aviation fuel pursuant to separate RCW chapters. S.B. Rep. On Substitute H.B. 1883, at 2, 63d Leg., Reg. Sess. (Wash. 2013). All references to chapters 82.36 and 82.38 RCW in this opinion are to the RCW in effect at the time of the Department of Licensing's tax assessments against Cougar Den—2013.

that fuel is then brought to market within Washington is not necessary or relevant for purposes of assessing tax due. The history of Washington's fuel tax regime only further reinforces this conclusion.

Washington first levied an excise tax on motor vehicle fuel in 1921. *Auto. United Trades Org. v. State*, 183 Wn.2d 842, 845, 357 P.3d 615 (2015) (citing Laws of 1921, ch. 173, § 2). Until 1999, retailers were primarily responsible for paying the tax. *Id.* at 847. To improve compliance and reduce administrative costs, Washington shifted the reporting and collection burden to the suppliers at the top of the fuel supply chain in 1999. S.B. Rep. on Substitute H.B. 2659, at 1-2, 55th Leg., Reg. Sess. (Wash. 1998).[2]

Refiners and terminal operators were now charged with collecting, reporting, and remitting excise tax when fuel was removed "from a terminal . . . at the rack," Laws of 1998, ch. 176, § 7(2)(a) (formatting omitted), or "from a refinery" by "bulk transfer" or "refinery rack," *id.* § 7(2)(b)(i), (ii) (formatting omitted). "'Rack'" is defined as a "mechanism for delivering . . . fuel from a refinery or terminal."[3] *Id.* §§ 6(23), 50(20) (formatting omitted). But distributors, and ultimately retailers, remained

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[2] At the time, there were 740 licensed fuel distributors and 27,000 individuals licensed to purchase fuel without paying tax at the time of purchase. S.B. Rep. on Substitute H.B. 2659, at 1.

[3] There were 24 terminal racks within Washington when the statute was last modified in 2013. S.B. Rep. on Substitute H.B. 1883, at 1, 63d Leg., Reg. Sess. (Wash. 2013).

burdened with paying the tax. *Squaxin Island Tribe v. Stephens*, 400 F. Supp. 2d 1250, 1261 (W.D. Wash. 2005). They were required to reimburse refiners and terminal operators for tax those suppliers prepaid on their behalf.[4] Laws of 1998, ch. 176, § 12(5). Fuel transport within Washington was not mentioned in the revised scheme, except for certain basic reporting obligations and routine inspections for those transporting fuel. *See id.* §§ 32, 33, 66, 80. For refined fuel bypassing the rack system via direct importation, the fuel importer would be liable for the tax on any fuel that it imports for purposes of "sale, consumption, use, or storage." *Id.* §§ 6(11), 7(2)(c), 50(12), 51(2)(c) (formatting omitted). Cougar Den's tax assessments arose under a version of this provision, as revised in 2007.

In 2007, the legislature revised the statute to address the opportunity *Squaxin Island Tribe*, 400 F. Supp. 2d at 1250, gave tribal retailers operating on Indian lands to avoid the imposition of Washington's fuel excise tax for their fuel sales to both tribal and nontribal members.[5] S.B. Rep. on S.B. 5272, at 1-2,

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[4] Further, refiners and terminal operators were entitled to refunds from the State for any prepaid tax they could not collect on fuel sold to distributors and retailers. Laws of 1998, ch. 176, § 15.

[5] The court held that despite suppliers' collection and reporting obligations under the 1999 statute, the legal incidence of the fuel excise tax regime continued to fall on retailers, rather than suppliers, distributors, or consumers. *Squaxin Island Tribe*, 400 F. Supp. 2d at 1261. To the extent those retailers were tribes or tribal members operating on Indian lands, they were exempt from Washington's fuel excise tax. *Id.* In *Squaxin*, the court applied *Oklahoma Tax Commission v. Chickasaw Nation*, 515 U.S. 450, 458-59, 115 S. Ct. 2214, 132 L. Ed. 2d 400 (1995), which

60th Leg., Reg. Sess. (Wash. 2007). Under the revised 2007 regime, those at the top of the supply chain-refiners and terminal operators—would now be solely responsible for the payment of tax when fuel is removed from their rack.[6] *Id.*; Laws of 2007, ch. 515, §§ 2, 6, 9, 18, 21. They would no longer prepay tax on behalf of the distributors and retailers they sold to. *Id.* §§ 4, 23.[7] Should there be any question, the legislature also added the following language: "It is the intent and purpose . . . that the tax shall be imposed *at the time and place of the first taxable event* and upon the first taxable person within this state." *Id.* at §§ 20, 33 (emphasis added); former RCW 82.36.022; former RCW 82.38.031. These changes reinforce the notion that possession, not distribution, is the intended activity subject to tax.

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established a legal incidence test, to determine whether Washington's fuel tax regime ran afoul of tribal sovereignty. *Id.* Under this test, who ultimately pays the tax does not control. "Although consumers in Washington State will nearly always find the tax imbedded in the price of fuel, the Supreme Court explicitly cautioned against using 'economic reality' as a basis for answering the legal incidence question." *Id.* (citing *Chickasaw*, 515 U.S. at 459-60). Instead, the language of the statute controls. *Id.* If this language places the legal incidence of the state tax on a sovereign party, that tax cannot be levied. *Id.*

[6] In response, some tribes threatened to establish their own refineries or terminals on Indian land in order to avoid the imposition of tax based on sovereign authority. *Auto. United Trades*, 183 Wn.2d at 848. Instead, most—excluding the Yakama Nation—entered into tax sharing arrangements in which the tribe receives a refund of tax paid by suppliers on fuel purchased by tribal members on their reservations. *Id.* at 850-51.

[7] Further, the suppliers' statutory mechanism to recover prepaid tax was removed. Laws of 2007, ch. 515, §§ 4, 23.

The legislature made another change in 2007 that reinforces this notion. From 1999 through 2007, tax applied to imported motor vehicle fuel only when that fuel was imported for purposes of "sale, consumption, use, or storage" within Washington. Laws of 1998, ch. 176, § 7(2)(c) (formatting omitted). Beginning in 2007, *all* imported motor vehicle fuel would be subject to tax, regardless of the purpose for which it was imported.[8] Laws of 2007, ch. 515, § 2(2)(c); former RCW 82.36.020(2)(c). This language was operative at the time of the Department of Licensing's (DOL) assessments against Cougar Den. *See* Clerk's Papers (CP) at 66-68, 81-82 (December 2013 and February 2014 DOL tax assessments against Cougar Den).

This history further demonstrates the legislature's intent—to impose tax at the highest level possible in the supply chain. For importation activities, this would be the first instance of *wholesale possession* of fuel within Washington. I fail to see how such a scheme directly implicates travel.

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[8] A similar "sale, consumption, use, or storage" condition was included in Washington's special fuel excise tax statute prior to the 2007 change. LAWS OF 1998, ch. 176, § 51(2)(c) (formatting omitted). In what may have been a scrivener's error, the language was retained for special fuel while removed for motor vehicle fuel. Laws of 2007, ch. 515, § 21(7)(c); former RCW 82.38.030(7)(c). When the statutes were later consolidated into chapter 82.38 RCW, effective July 1, 2015, this conditional language remained. Laws of 2013, ch. 225, § 103(7)(c). It is not clear whether keeping this conditional language was intended, as it had previously been removed in 2007 for imported motor vehicle fuel.

B. The Yakama Nation's treaty right to travel applies to trade *only* when it cannot be meaningfully separated from travel, not when travel is merely necessary for trade

Both *Smiskin* and *King Mountain* provide that a treaty right to travel applies to trade *only* when Washington law imposes a limitation on travel and trade, *and* the two cannot be meaningfully separated. *United States v. Smiskin*, 487 F.3d 1260, 1266 (9th Cir. 2007); *King Mountain Tobacco Co. v. McKenna*, 768 F.3d 989, 997-98 (9th Cir. 2014). Such is not the case with Washington's fuel excise tax. The majority fails to see this distinction and, instead, concludes that Cougar Den's trading activity is exempt from Washington's fuel excise tax merely because travel is necessary for trade. But neither *Smiskin* nor *King Mountain* held this to be a relevant consideration.

At issue in *Smiskin* was the application of the contraband cigarette trafficking act (CCTA), 18 U.S.C. § 2342(a), to a Yakama Nation member. 487 F.3d at 1263. The CCTA imposes criminal penalties for dealing in contraband cigarettes. *Id.* "Contraband cigarettes," in turn, are defined by state law. Washington law provides that cigarettes not containing tax stamps that are transported by wholesalers who fail to first notify Washington's Liquor Control Board of their intent to transport are contraband. *Id.*; RCW 82.24.250(1). Transport, *not possession*, was the predicate for the prosecution at issue in *Smiskin*.[9]

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[9] In *United States v. Fiander*, another Yakama Nation member successfully defended a CCTA charge based on his treaty right to travel. 547 F.3d 1036 (9th Cir. 2008). While the

In ruling for Smiskin, the United States Court of Appeals for the Ninth Circuit held that his treaty right to travel preempted Washington's transportation notice requirement because the right includes the right to "'transport goods to *market*' for '*trade* and other purposes'" and the notice requirement burdened such transport. *Smiskin*, 487 F.3d at 1266 (quoting *Cree v. Flores*, 157 F.3d 762, 769 (9th Cir. 1998)). The court noted that when "the right to travel overlaps with the right to trade . . . such that excluding commercial exchanges . . . would effectively abrogate our [prior decisions] and render the Right to Travel provision truly impotent," it should not "draw what would amount to an arbitrary line between travel and trade." *Id.* at 1266-67. But *Smiskin* does not stand for the proposition the majority asserts—the Yakama Nation's treaty right to travel is a de facto right to trade simply because travel is necessary for trade. Indeed, a reading of *King Mountain* confirms the opposite to be true. 768 F.3d at 989. Travel was necessary for the trade at issue in *King Mountain*, yet the Ninth Circuit found the state obligation burdened only trade, rather than travel and, therefore, was not preempted by the Yakama Nation's treaty right to travel. *Id.* at 997-98. *Smiskin* simply stands for the proposition that when travel and trade cannot be meaningfully separated within a state

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CCTA defense was upheld, the court held the defendant could still be prosecuted for conspiracy to violate the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. § 1962(d), for his activities. *Id.* at 1039-42.

scheme, a Yakama Nation member's treaty right to travel preempts both aspects of that scheme.

The state obligation in *King Mountain* arose from a Washington statute requiring tobacco product manufacturers to place into escrow funds to reimburse Washington for health care costs associated with the tobacco products they sold to Washington consumers. *Id.* at 991-92; RCW 70.157.020. King Mountain asserted that the Yakama Nation's treaty right to travel "'unequivocally prohibit[s] imposition of economic restrictions . . . on the Yakama people's Treaty right to . . . trade,'" which includes bringing goods to market. *King Mountain*, 768 F.3d at 997. But the Ninth Circuit held otherwise, limiting the scope of the treaty right to travel to "'guarantee[ing] the Yakamas the right to transport goods to market over public highways without payment of fees for that use.'" *Id.* (quoting *Cree*, 157 F.3d at 769). It is not a "right to trade." *Id.*

Cougar Den and amicus make similar arguments as King Mountain attempted to make—the treaty applies equally to trade and travel. Resp't's Br. at 24-26; Amicus Curiae Br. of Yakama Nation at 12-13; *see King Mountain*, 768 F.3d at 992 (King Mountain asserts treaty right applies to "state economic regulation"). But this is not so. The treaty right applies to trade only if inextricably linked to travel. Otherwise, the argument fails. *Smiskin*, 487 F.3d at 1266. As a result, it should fail here, as it failed in *King Mountain*, 768 F.3d at 997-98.

The escrow payment in *King Mountain* had nothing to do with travel, other than to impose a financial burden on the products King Mountain sought to bring to market in Washington.[10] *Id.* at 991; *see* RCW 70.157.020 (requiring an escrow payment by tobacco manufacturers for products sold to "consumers within the State"). Similarly, Washington's fuel excise tax on importers, imposed on the first incidence of wholesale possession of fuel within Washington, has nothing to do with travel, other than to impose a financial burden on the products fuel importers seek to bring to market in Washington. Former RCW 82.36.020(2)(c), .022; former RCW 82.38.030(7)(c), .031. In both instances, King Mountain's and Cougar Den's, travel is necessary for trade.

Without travel, most goods have no market. But as *King Mountain* demonstrates, necessity of transport, without an inextricable link between travel and trade, is not sufficient for preemption. 768 F.3d at 997-98. The necessity to bring its burdened goods to market did not entitle King Mountain to an exemption on its escrow obligation. Nor should Cougar Den be entitled to such an exemption.

Curiously, the majority claims, "*Smiskin* is nearly identical to this case." Majority at 13. I disagree. The specific provision Harry Smiskin was accused of violating required a wholesaler to "'give[] notice to the [Liquor Control Board] in advance of the commencement of *transportation*'" of unstamped cigarettes. *Smiskin*, 487 F.3d at 1263 (emphasis

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[10] King Mountain also distributed its products outside of Washington. *King Mountain*, 768 F.3d at 997-98.

added) (second alteration in original) (quoting RCW 82.24.250(1)). Transportation was at the very essence of the Washington law at issue in *Smiskin*. *See* RCW 82.24.250(1). Trade was peripheral. Washington's fuel excise tax, on the other hand, accrues "at the time and place of the first taxable event and upon the first taxable person within this state," i.e., *wholesale possession*, not subsequent transportation. Former RCW 82.36.022; former RCW 82.38.031. I fail to see the similarity between *Smiskin* and this case.

C. The implications of the majority's holding extend beyond this tax regime

The majority is too quick to dismiss the "'parade of horribles'" the State claims could arise from the majority's ruling. Majority at 16. True, felons will not avoid firearm possession charges as a result of this holding, even if they are Yakama Nation members traveling on public highways. Nor would Washington be precluded from regulating the transportation of restricted goods by tribal members. The regulatory exception covers such instances. *Smiskin*, 487 F.3d at 1271.

But what this ruling puts at risk is Washington's, and potentially other states', ability to tax goods consumed within its borders. A simple extension of the majority's logic would allow *nontribal members* to avoid the imposition of state use, excise, or sales tax on goods they consume through a contrived transport by Yakama Nation or Nez Perce tribal members.[11] The

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[11] Both the Nez Perce and Yakama Nation tribes have similar treaty rights to travel. *Cree*, 157 F.3d at 772. The majority's

majority provides no clear limits. Transport is *necessary* to bring many goods to market. *See* Appellant's Opening Br. at 33 (discussing the potential impact on Washington's use tax regime from such a ruling). Does this mean all goods transported to market by Yakama Nation members, regardless of the identity of the buyer and the purpose of transport, are exempt from state tax? Nothing indicates any of the parties understood the Treaty of 1855 to provide for such a right. *See Cree*, 157 F.3d at 766-68 (describing the historical context of treaty negotiations). Yet the majority's ruling seems to create just such a right.

Ours is a case in point. Cougar Den delivers almost all of its fuel to retail gas stations in Washington. Those gas stations, in turn, sell not just to tribal members, but the general public.[12] Cougar Den seeks an exemption from Washington's fuel excise tax on *all* of the fuel it distributes. Indeed, another Yakama Nation member has made similar claims in California, with detrimental impacts not just to the state's ability to tax, but its competitive business environment. *See Salton Sea Venture, Inc. v. Ramsey*, No. 11CV1968-IEG, 2011 WL 4945072, at *7 (S.D. Cal. Oct. 18, 2011) (court order) (competitor asserts a Yakama Nation member's claimed exemption from the imposition of

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rnling could apply with equal force to transport activities by members of either tribe.

[12] Cougar Den asserts that it provides "fuel [only] to members of the Yakama Nation." Resp't's Br. at 4. But it fails to note that "more than 90 percent of the fuel it imported" during the period at issue was to tribal members who are "retail gas stations [permitted to] . . . sell to 'any person.'" CP at 1004.

California's fuel excise tax due based on the treaty right to travel was an unfair business advantage). The majority's ruling would, undoubtedly, provide a basis for further examples.

For the reasons stated above, I dissent. The Yakama Nation's treaty right to travel on public highways does not preclude taxation of Cougar Den's off-reservation fuel distribution activities pursuant to former chapters 82.36 and 82.38 RCW. I would reverse the superior court and affirm the ruling of DOL's director. Like the majority, I would not reach Cougar Den's appearance of unfairness argument because of the de novo review engaged in by this court.

s/ Fairhurst, C.J.

s/ Wiggins, J.

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SUPERIOR COURT
YAKIMA CO WA

IN THE SUPERIOR COURT OF WASHINGTON FOR YAKIMA COUNTY

COUGAR DEN INC., a Yakama Nation corporation, Petitioner, v. DEPARTMENT OF LICENSING OF THE STATE OF WASHINGTON, Respondent.	Cause No.: 14-2-03851-7 [~~PROPOSED~~] FINDINGS OF FACT AND CONCLUSIONS OF LAW

THIS MATTER came before the Court on July 10, 2015, on Petitioner Cougar Den Inc.'s Amended Petition for Judicial Review of Final Order of the Department of Licensing. The Court has reviewed the pleadings and files of record, including the following:

1. Certified Agency Record ("Agency Record") of OAH Docket NO. 2014-DOL-0006, Agency No. 756M;

2. Petition for Review of Final Order of Department of Licensing;

3. Petitioner's Motion for Leave to File Amended Petition;

4. Declaration of Harry Smiskin;

5. Respondent's Opposition to Petitioner's Motion for Leave to File Amended Petition;

6. Respondent's Motion to Strike Declaration of Harry Smiskin;

7. Petitioner's Response to Motion to Strike Declaration of Harry Smiskin;

8. Declaration of Andre M. Penalver in Response to Motion to Strike Declaration of Harry Smiskin;

9. Cougar Den's Reply in Support of Motion for Leave to File Amended Petition;

10. Declaration of Andre M. Penalver in Support of Reply for Leave to File Amended Petition;

11. Order Granting Leave to File Amended Petition and Denying Respondent's Motion to Strike Declaration of Harry Smiskin;

12. Amended Petition for Review of Final Order of Department of Licensing;

13. Cougar Den's Appeal Brief;

14. Respondent's Brief;

15. Cougar Den's Reply Brief in Support of Appeal;

16. Respondent's Citation of Supplemental Authority;

17. Cougar Den's Response to Respondent's Citation of Supplemental Authority.

On July 10, 2015, the Court heard oral argument from Andre Penalver, counsel for Cougar Den, Inc., and Fronda Woods, counsel for the Department of Licensing. Now, therefore, being fully advised, the Court hereby makes the following:

I. FINDINGS OF FACT

1. Pursuant to RCW 34.05.514 and RCW 34.05.542, Petitioner Cougar Den, Inc., timely filed a petition for judicial review of the Final Order of Director in *In re Cougar Den*, OAH Docket No. 2014-DOL-0006, Fuel Tax Assessment No. 756M.

2. On January 30, 2015, this Court granted Petitioner's Motion for Leave to File Amended Petition and denied Respondent's Motion to Strike Declaration of Harry Smiskin.

3. Pat Kohler is the Director of the Washington Department of Licensing. During 2013, the State of Washington and the Yakama Nation were parties to a lawsuit in federal court concerning fuel taxes. As Director, Pat Kohler represented the Department of Licensing in mediation sessions with the Yakama Nation Tribal Council Chairman regarding the lawsuit. Decl. Harry Smiskin. The lawsuit was settled and dismissed in November 2013. Agency Record, pp. 549-50; Decl. Andre M. Penalver Supp. Reply for Leave to File Am. Pet. As part of the settlement, the Yakama Nation and the State of Washington executed a Fuel Tax Agreement. Agency Record, pp. 160-75; Decl. Harry Smiskin Attach. B. Pat Kohler signed the Fuel Tax Agreement on behalf of the Department of Licensing. Agency Record, p. 175; Decl. Harry Smiskin Attach. B p. 16.

4. Fuel Tax Assessment No. 756M expressly referenced the Fuel Tax Agreement. Agency Record, p. 151.

5. On July 24, 2014, upon Motions for Summary Judgment by both parties, an Administrative Law Judge issued an Initial Order in Cougar Den's favor in *In re Cougar Den*, OAH Docket No. 2014-DOL-0006. Agency Record, pp. 847-60. The Initial order struck down all taxes, interest, penalities, and licensing requirements at issue in Fuel Tax Assessment No. 756M.

6. On October 15, 2014, upon the Department's Petition for Review of Initial Order, Pat Kohler, Director of the Department of Licensing, issued a Final Order of Director in the Department's favor. Agency Record, pp. 935-46. The Final Order of Director reversed the Initial Order and reinstated the taxes, interest, penalties, and licensing requirements at issue in Fuel Tax Assessment No. 756M.

7. The Court incorporates by reference the Findings of Fact in the Final Order of Director. Agency Record, pp. 938-40; *see* Agency Record, pp. 47-50 (Stipulation of Facts). No party has contended that they are not supported by substantial evidence. *See* RCW 34.05.570(3)(e).

8. In reference to Conclusions of Law 2 and 3, the Court incorporates by reference the Findings of Fact of *Yakama Indian Nation v. Flores*, 955 F. Supp. 1229 (E.D. Wash. 1997). Agency Record, pp. 251-58.

II. CONCLUSIONS OF LAW

1. This Court has jurisdiction over this matter pursuant to RCW chapter 34.05, Part V. Venue is proper in the Yakima County Superior Court pursuant to RCW 34.05.514(1).

2. Article III of the Treaty codifies the Yakamas' right to travel upon all public highways ("the Right to Travel"). When travel is at issue, courts and adjudicators are required to examine the historical context of the Treaty to interpret the Right to Travel as the Yakamas of 1855 would have understood it, resolving any doubtful expressions in the Yakamas'

favor. The Director's failure to examine the historical context of the Right to Travel constitutes an erroneous interpretation or application of the law and is reversible error as provided by RCW 34.05.570(3)(d).

3. To examine the historical context of the Treaty, the Director should have looked to the Findings of Fact of *Yakama Indian Nation v. Flores*, 955 F. Supp. 1229 (E.D. Wash. 1997) (Agency Record, pp. 251-58). Such Findings are preclusive in this case.

4. Based on that historical context and pursuant to RCW 34.05.574, the Court determines that the Director's decision in this matter should be set aside because it erroneously interprets and applies the law for the reasons described in Attachment A, and that this is reversible legal error that the Court may address pursuant to RCW 34.05.570(3)(d).

5. Because Cougar Den's transport of fuel falls within its Right to Travel under the Treaty With the Yakamas, and because Assessment No. 756M places a restriction on the Right to Travel, Assessment No. 756M and its taxes, penalties, interest, and licensing requirements are preempted and barred by the Treaty. The Director's conclusion to the contrary is an erroneous interpretation or application of the law and is reversible error as provided by RCW 34.05.570(3)(d).

6. Although not necessary to reach the Conclusions provided above, Assessment No. 756M expressly referenced the Fuel Tax Agreement, which arose from mediation sessions that Director Pat Kohler attended

as a party. It thus appears unfair that Ms. Kohler would review the Initial Order that struck down Assessment No. 756M. Her role in issuing the Final Order gives the Final Order an aura of partiality, impropriety, conflict of interest, or prejudgment, and thus violates Washington's Appearance of Fairness doctrine for the reasons described in Attachment A. Ms. Kohler was required to recuse herself and delegate the review of the Initial Order as permitted by RCW 34.05.425 and RCW 43.24.016(2). Because of her failure to do so, the agency engaged in unlawful procedure under RCW 34.05.570(3)(c). Pursuant to RCW 34.05.570(3)(g), Cougar Den has shown facts to support the grant of a motion for Ms. Kohler's disqualification.

7. The Court incorporates by reference its July 22, 2015 letter ruling on this matter, attached hereto as Attachment A.

8. The Final of Director in *In re Cougar Den*, OAH Docket No. 2014-DOL-0006, Fuel Tax Assessment No. 756M, shall be set aside pursuant to RCW 34.05.570(3) and RCW 34.05.574(1).

WHEREFORE, the Court enters the following:

III. FINAL JUDGMENT AND ORDER

IT IS ORDERED that the Final Order of Directory is set aside, and that Cougar Den, Inc. is exempt from the taxes, penalties, interest, and licensing requirements at issue in the adjudicative proceeding on review.

DATED this 18th day of August, 2015.

s/ Judge Michael G. McCarthy
JUDGE MICHAEL G. McCARTHY

Presented by:
STOKES LAWRENCE VELIKANJE MORE & SHORE

By: *s/ Andre M. Penalver - 43073*
Brendan V. Monahan(WSBA #22315)
Andre M. Penalver (WSBA #43073)
Attorneys for Cougar Den Inc.

Approved as to form;
Notice of Presentment Waived

OFFICE OF THE ATTORNEY GENERAL

By: *s/ Fronda Woods*
Fronda C. Woods (WSBA #18728)
Attorneys for Department of Licensing

ATTACHMENT A
[Letter]

Superior Court of the State of Washington
for the County of Yakima
Judge Michael G. McCarthy
Department No. 2

Andre Penlaver
Stokes Lawrence Velkanje Moore and Short
120 North Naches Avenue
Yakima WA 98901-2757

Fronda Woods
Assistant Attorney General
Licensing and Administrative Law Division
PO Box 40110
Olympia WA 98504-0110 July 22, 2015

Re: Cougar Den Inc. v. Department of Licensing
Yakima County Cause No. 14-2-03851-7

Dear Counsel:

This matter comes before the Court as an appeal under the Administrative Procedure Act from an assessment levied upon Cougar Den, Inc. (Appellant), by the Washington State Department of Licensing (Respondent) for unpaid fuel taxes and associated penalties.

Procedurally, this matter was heard by an Administrative Law Judge, who ruled for the Appellant. The Respondent appealed and prevailed before Pat Kohler, the Director of the Department of Licensing. The Appellant subsequently appealed to this court.

Appellant argues, pursuant to RCW 34.05.570(3)d, that the Director "erroneously interpreted or applied the law". This Court therefore considers the legal underpinnings of the decision under review de novo.

Cougar Den is a tribal corporation, doing business on the Yakama Reservation. The particular business involved in this case is the purchase of fuel in the State of Oregon, and its transport to the reservation. The transportation from the fuel terminal in Oregon to the reservation is made by a non-tribal commercial trucking firm. Cougar Den then sells the fuel, as a wholesaler, to other tribal corporations or members.

According to the Respondent, the transport of the fuel into the State of Washington creates a taxable event under RCW 82.36.020 and 82.38.030. The gravamen of the Appellant's argument is that Article III of the

Treaty with the Yakamas shields Cougar Den from the assessed tax.

The Treaty provides in pertinent part as follows:

And provided, That, if necessary for the public convenience, roads may be run through the said reservation; and on the other hand, the right of way, with free access from the same to the nearest public highway, is secured to them; as also the right, in common with citizens of the United States, to travel upon all public highways.

It is well settled jurisprudence that a treaty entered into between the United States and any Indian tribe must be constructed as it would have been understood by the tribal members at the time of signing and any ambiguities in the document must be resolved in favor of the tribe. *Tulee v. Washington*, 315 U.S. 681, 684-5, 62 S. Ct. 862, 86 L. Ed. 1115 (1942).

We have the benefit of several decisions which have construed the right to travel provision of the Treaty with the Yakamas.

In *Cree v. Flores*, 157 F.3d 762 (9th Cir. 1998), the Court reviewed the findings of the District Court, made after an extensive evidentiary hearing focused upon the intent of the parties to the Treaty in order to interpret the scope of the right to travel provision of Article III. The trial court found, and the Court of Appeals affirmed, the Treaty secured to the Yakamas the right to travel off the reservation for fishing, hunting, gathering and trade purposes. *Cree* at 770. And it was improper for the State to burden such travel with monetary assessments.

In *United States v. Smiskin*, 487 F.3 1260 (9th Cir. 2007), the Court recognized the inherent link between the right to travel and the right to trade. "[T]he right to travel overlaps with the right to trade under the Yakama Treaty such that excluding commercial exchanges from its purview would effectively abrogate" the decision in *Cree v. Flores*, supra.

This interpretation of the right to travel in Article III of the Treaty is the only view that makes any sense. An aboriginal people would not be interested in securing a right to travel unless it had some purpose, such as trade.

Respondent relies upon *King Mountain Tobacco Company v. McKenna*, 768 F.3d 989 (9th Cir. 2014) for the proposition the Treaty does not reserve to the Yakamas the right to trade. The Respondent is correct that a freestanding right to engage in commerce is not the Treaty, but the *King Mountain* court affirmed the rulings in *Cree* and *Smiskin*, recognizing the right to travel encompassed a right to trade in conjunction with the travel.

Additionally, the taxable event in *King Mountain* was the sale of cigarettes, not their travel. See RCW 70.157.010 & .020. The Court correctly ruled that the Treaty did not shield the sale from taxation.

It is clear to this Court that Article III of the Treaty shields the transport of fuel, owned by Cougar Den and intended for sale to tribal members and entities on the reservation, from taxation under Title 82 of the Revised Code of Washington. The taxable event is the movement of the fuel across the Columbia River and into the State of Washington. And, under the terms of

the Treaty, this event cannot be taxed by the Respondent.

There is one factor which is troubling. The actual travel is not done by a member of the tribe or by a tribal entity. A private commercial trucking company, hired and directed by Cougar Den, actually conducts the transport. If the carriage of the fuel were done by Cougar Den or some other tribal entity, the Appellant's position would be unassailable. The question is whether the utilization of the non-Indian entity invalidates the Treaty's protection.

In *Cree v. Flores*, supra, the Court recognized that the right to travel can be exercised by tribal members or entities through non-Indian third parties. In *Cree*, logs owned by the tribe were transported on trucks owned by tribal members or entities to sawmills off the reservation. Some of the drivers were not members of the tribe. This circumstance did not invalidate the right to travel.

In the instant case, the fuel is purchased by Cougar Den, loaded onto a tanker truck owned by KAG West, a non-tribal trucking firm, driven into the State of Washington and delivered to the Appellant on the reservation and thereafter distributed to tribal members and tribal entities. The transporter, although it executes the taxable event of crossing the board and entering Washington, it is not liable for any tax. Only the owner of the fuel is subject to tax. (See Final Order of Director, Conclusion of Law #13) And the owner of the fuel is a tribal entity which has a right to travel in conjunction with trade. The purchase, transportation and delivery of fuel by a tribal entity for use by tribal members and entities is

clearly shielded by the Treaty. Consequently, the assessment of a fuel tax and associated penalties against Cougar Den by the Department of Licensing is null and void.

Cougar Den raises a second issue; the propriety of Pat Kohler, Director of the Department of Licensing, sitting in an adjudicatory capacity during the administrative review of this matter.

The record contains certain facts which implicate RCW 34.05.425 and the Appearance of Fairness Doctrine.

In the first instance, the parties to this proceeding are the Cougar Den, Inc., and the Department of Licensing. Incongruously, the director of the latter was an adjudicator of the issues which are now before this court.

Secondly, the assessment which is the focus of this litigation was ostensibly assessed pursuant to a Fuel Tax Agreement entered into between the Yakima Nation and the Department of Licensing in 2013. The Agreement (Attachment B to the Declaration of Harry Smiskin) is referenced in the written notification given to Cougar Den (Stipulated Exhibit No. 7). Pat Kohler negotiated the Agreement on behalf of the Department of Licensing and was a signatory to the Agreement.

The Declaration of Harry Smiskin further relates that Ms. Kohler, in the course of the negotiations, argued "the Treaty did not apply to taxes on imported fuel, even if the fuel was brought on state roads." This is precisely the issue she considered as an adjudicatory

officer in the course of the administrative appeal of this matter.

"The appearance of fairness doctrine is meant to prevent a biased or potentially interested judge from ruling on a case. Sustaining a claim that the appearance of fairness was violated requires evidence of the judge's bias. Under the appearance of fairness doctrine, a judicial proceeding is valid only if a reasonably prudent and disinterested person would conclude that all parties obtained a fair, impartial, and neutral hearing." *Olympic Healthcare Services II LLC v. Department of Social & Health Services*, 175 Wn. App. 174, 304 P.3d 491 (2013) (citations and internal quotations omitted).

Although the Appearance of Fairness Doctrine applies only to judicial officers and to certain officials involved in land use decisions, RCW 34.05.425(3) makes it applicable to the administrative process followed in the instant case. The statute provides "[a]ny person serving or designated to serve alone or with others as presiding officer is subject to disqualification for bias, prejudice, interest, or any other cause provided in this chapter *or for which a judge is disqualified.*" (emphasis added)

Although the Appellant did not raise the issue during the administrative adjudication, it has been raised now, primarily on the basis of Mr. Smiskin's sworn statement. Given the totality of the circumstances, a reasonably prudent and disinterested person would conclude Ms. Kohler's participation as an arbiter did not appear to be fair. Consequently, her decision should be vacated on this ground as well.

Mr. Penalver is requested to prepare appropriate Findings of Fact, Conclusion of Law and an Order.

Very truly yours,

s/ Michael G. McCarthy
Michael G. McCarthy
Judge

PROCEEDINGS BEFORE THE DIRECTOR OF THE DEPARTMENT OF LICENSING STATE OF WASHINGTON

In the Matter of the Fuel Tax Assessment Issued to: COUGAR DEN, INC., Respondent.	OAH Docket No. 2014-DOL-0006 Fuel Tax Assess. No. 756M FINAL ORDER OF DIRECTOR

I. DIRECTOR'S CONSIDERATION

1.1 Initial Order. This matter has come before the Director to review the Initial Order entered by Administrative Law Judge Stephen K. Leavell on July 24, 2014 (Initial Order), which is attached and incorporated into this Order by reference.

1.2 Petition for Administrative Review. The Prorate and Fuel Tax Program, Department of Licensing (Program), filed a petition for administrative review of the Initial Order on August 12, 2014. The Program argues that the Initial Order misread United States Supreme Court precedent and improperly characterized the legal incidence of the taxes at issue in this case as imposed on an Indian within an Indian reservation, where the legal incidence of the taxes is actually imposed at the point at which fuel entered into the state off-reservation, at the Oregon-Washington border.

The Program argues that the Initial Order also erroneously concluded that the fuel was exempt from fuel taxes because its sale on the reservation was in "interstate or foreign commerce," where the fuel

actually never left the state of Washington, and the reservation is part of the state.

Finally, the Program argues that the Initial Order erred in concluding that the Yakama Treaty precluded the state from taxing the imported fuel based on the treat right to travel upon the public highways, where *United States v. Smiskin*, 487 F.3d 1260 (9th Cir. 2007) held only that Washington could not require tribal members to give notice to the state that they were transporting untaxed cigarettes for consumption on the reservation, but courts have not held that the state could not tax a product.

The Program filed a statement of additional authority in support of its petition for review on September 26, 2014. It is a copy of the Ninth Circuit decision in *King Mountain Tobacco Co., Inc. v. McKenna*, No. 13-35360, affirming the district court opinion cited in the Program's petition for review and holding that there is no "right to trade" in the Yakama Treaty.

Respondent Cougar Den, Inc. (Cougard Den) filed a response to the petition for review on August 26, 2014. Cougar Den argues that the Initial Order is correct and the Yakama Treaty is an express federal law that permits the Yakamas a "right to transport goods without restriction" and a "right to trade" free of any state tax or regulation. *Cree v. Flores*, 157 F.3d 762 (9th Cir. 1998) held that Yakama members could carry out logging operations outside the reservation without payment of fees for the use of public highways. *United States v. Smiskin*, 487 F.3d 1260 (9th Cir. 2007) construed the right to travel provision of the Yakama Treaty as overlapping with the right to

trade under the Treaty. Cougar Den argues that the fuel taxes at issue are a tax on hauling goods to market over the public highways. Cougar Den filed a response to the Program's statement of additional authority on September 30, 2014, arguing that the treaty right to travel is dispositive of this case and distinguishing the *King Mountain* decision.

1.3 Record of Proceeding. The entire record of this proceeding was presented to the Director for her review and the entry of a final decision.

The description of the record in the "Exhibits" section of the Initial Order is incomplete and is MODIFIED to read as follows:

> The parties agreed to Stipulated Facts 1-18 and Exhibits 1-9. The following evidentiary materials were also submitted by the parties for the purposes of their cross-motions for summary judgment.

ADDITIONAL EXHIBITS AND DECLARATIONS SUBMITTED BY COUGAR DEN

Exhibit No.	Description
	Declaration of Kip Ramsey III (April 7, 2014)
Attachment A to Decl. of Kip Ramsey III	Invoices dated 4/28/2013, 6/15/2013, 7/13/2013, 8/6/2013, 9/10/2013, and 10/24/2013
	Declaration of Andre M. Penalver (April 11, 2014)
Attachment A to Decl. of Andre M. Penalver	Assessment Numbers 760M and 761M

Attachment A to Respondent's Supplemental Authority	Yakama Nation General Council Memorandum (April 2, 2014) Yakama Nation General Council Motion GCM-10-2014 (March 13, 2014) Yakama Nation General Council Resolution GC-03-2014 (March 21, 2014)
Attachment B to Respondent's Supplemental Authority	Yakama Nation General Council Resolution dated Feb. 18, 1944 Yakama Nation General Council Resolution T-86-80 (June 26, 1980)

ADDITIONAL EXHIBITS AND DECLARATIONS SUBMITTED BY DEPARTMENT OF LICENSING PRORATE AND FUEL TAX PROGRAM

Exhibit No.	Description
	Declaration of Paul W. Johnson (April 24, 2014)
Exhibit 1 to Decl. of Paul W. Johnson	Yakama Nation Petroleum Permits provided to Washington Department of Licensing Prorate and Fuel Tax Section between November 2012 and November 2013
Exhibit 2 to Decl. of Paul W. Johnson	Table A—Fuel Deliveries to Yakamart, March 1, thru October 31, 2013 Table B—Fuel Deliveries, January 1, thru December 21, 2013
	Declaration of John Lane (April 22, 2014)
Exhibit A to Decl. of John Lane	Yakama Nation Retrocession Petition (July 2012) pages 25 through 27
	Declaration of Fronda Woods (April 29, 2014)
Attachment A to Decl. of Fronda Woods	November 12, 2013 letter from Yakama Nation Chairman Harry Smiskin to Washington Governor Jay Inslee and Department of Licensing Director Pat Kohler
Attachment B to Decl. of Fronda Woods	November 18, 2013 letter from Yakama Nation Chairman Harry Smiskin to Washington Governor Jay Inslee and Department of Licensing Director Pat Kohler

Attachment C to Decl. of Fronda Woods	Washington v. Tribal Court for the Confederated Tribes & Bands of the Yakama Nation, No. CV-12-3152-LRS, Order Granting Joint Motion to Dismiss With Prejudice and Without Costs (RD. Wash. Nov. 21, 2013)
Attachment D to Decl. of Fronda Woods	Washington v. Tribal Court for the Confederated Tribes & Bands of the Yakama Nation, No. 13-36161, Order (9th Cir. Nov. 22, 2013)
Attachment E to Decl. of Fronda Woods	November 19, 2013 letter from Yakama Nation General Council officers to Deputy and Assistant Attorneys General
Attachment F to Decl. of Fronda Woods	Emails between Quanah Spencer and Fronda Woods dated November 20 and 22, 2013
Attachment G to Decl. of Fronda Woods	Teo v. Steffenson, No. CY-93-3050-AAM, Consent Decree (E.D. Wash. Nov. 3, 1994), and Teo v. Steffenson, No. CV-04-3079-CI, Settlement Agreement, Agreed Changes to Consent Decree, and Order (E.D. Wash. Aug. 21, 2006)

1.4 Issue. The description in the "Issue" section of the Initial Order is incomplete and is STRICKEN in its entirety. The following issue statement is ADOPTED:

> Did Cougar Den import fuel to Washington from March through October 2013 in violation of chapters 82.36 and 82.38 RCW? If so, does Cougar Den owe $3,639,954.61 (as of December 9, 2013), including tax, penalties, and interest?

1.5 Findings of Fact. Having considered the record of this proceeding and the arguments of counsel, the Director ADOPTS Findings of Fact, 1, 2, 4-7, 9, 10, 12-14, 17, and 18 of the Initial order.

Finding of Fact 3 of the Initial Order is MODIFIED to conform to the stipulated facts to read as follows:

3. In entering into the Treaty of 1855, the Yakama Nation ceded land ("the Ceded Area") to the United States. A map of the ceded lands is maintained by the Yakama Nation and is available to the public at http://www.yak amanation-nsn.govidocs/CededMap0001.pdf.

Finding of Fact 8 of the Initial Order is MODIFIED to conform to the stipulated facts and correct typographical errors to read as follows:

8. On September 29, 1993, the Secretary of the Yakama Tribal Council issued a document to Cougar Den, Inc. entitled "Petroleum Products License Responsibilities." The Yakama Tribal Council revoked the document on October 2, 2013.

Finding of Fact 11 of the Initial order is MODIFIED to conform to the stipulated facts and correct a typographical error to read as follows:

11. Cougar Den has never applied for or held any type of motor vehicle fuel license or special fuel license issued by the State of Washington.

Finding of Fact 15 of the Initial Order is MODIFIED to conform to the stipulated facts and correct typographical errors to read as follows:

15. On December 9, 2013, the Washington Department of Licensing issued Assessment Number 756M to Cougar Den, Inc. Assessment Number 756M described the taxes, penalty, and interest the Department asserted were then owed to the State of Washington with respect to the fuel shown in the above table.

Finding of Fact 16 of the Initial Order is MODIFIED to conform to the stipulated facts and correct typographical errors to read as follows:

16. The Respondent made a timely appeal of Assessment 756M through a Letter of Appeal, dated January 3, 2014, sent to the Department.

Additional Findings of Fact 19-23 are ADOPTED to read as follows:

19. Cougar Den contracted with KAG West to transport fuel in KAG West's trucks from Oregon to customers within the Yakama Reservation from March 2013 through October 2013. Decl. Ramsey ¶ 5; Stip. Ex. 5 (*see* "Schedule of Receipts" and "Schedule of Disbursements" pages).

20. When Cougar Den, Inc. sells fuel to a business, its invoice includes an amount for federal taxes and fees, and an amount for tribal taxes. Decl. Ramsey ¶ 6 & Attach. A. On October 2, 2013, the Yakama Tribal Council rescinded the tribal tax. Stip. Ex. 6.

21. Cougar Den sold more than 90 percent of the fuel it imported to Wolf Den and Kiles Korner, both in Wapato. Stip. Ex. 5 ("Schedule of Disbursements" pages). Wolf Den and Kiles Korner are retail gas stations owned and operated by Yakama tribal members under permits from the Yakama Nation. Decl. Johnson ¶ 3 & Ex. 1; *see* Decl. Ramsey Attach. A. Yakama tribal law allows tribally-licensed fuel retailers to sell to "any person." RYC § 30.11.09 (Stip. Ex. 9).

22. Cougar Den sold the remaining fuel it imported to Cougar Den, Inc. and Tiin-Ma

Logging, both in White Swan. Stip. Ex. 5 ("Schedule of Disbursements" pages). Cougar Den, Inc. is a retail gas station and restaurant owned by Kip Ramsey. Decl. Johnson ¶ 3 & Ex. 1; Decl. Ramsey ¶ 2. Tiin-Ma Logging is owned by Kip Ramsey. Decl. Ramsey ¶ 6 & Attach. A.

23. Before April 2013, Wolf Den, Kiles Korner, and Cougar Den bought fuel from Washington-licensed fuel suppliers. Decl. Johnson ¶ 6 & Exhibit 2, Table B.

1.6 Conclusions of Law. Having considered the record of this proceeding and the arguments of counsel, the Director STRIKES the Conclusions of Law of the Initial Order in their entirety.

The Director ADOPTS new Conclusions of Law 1-23 to read as follows:

Jurisdiction

1. There is jurisdiction to hear this matter pursuant to chapter 34.05 of the Revised Code of Washington (RCW), RCW 82.36.045, 82.38.170, and chapter 10-08 of the Washington Administrative Code (WAC).

Structure of Washington Fuel Tax Laws

2. Washington state law imposes a tax upon fuels used for the propulsion of motor vehicles upon the highways of the state. Chapter 82.36 RCW governs taxes on motor vehicle fuel, or gasoline. RCW 82.36.010(19); WAC 308-72-800(3). Chapter 82.38 RCW governs taxes on "special fuel," which includes diesel fuel. WAC 308-77-005(1); *see* RCW 82.38.020(23). Fuel taxes are imposed at the wholesale level, when fuel is removed from the

terminal rack or imported into the state. RCW 82.36.020(2) and 82.38.030(7). The current tax rate is 37.5 cents per gallon. RCW 82.36.025 and 82.38.030.

3. Fuel is "imported" when it is brought into this state by means of conveyance other than the fuel supply tank of a motor vehicle. RCW 82.36.010(10) and 82.38.020(12). A person who causes fuel to be imported by a means other than the bulk transfer-terminal system, who owns the fuel at the time of such importation, is acting as a fuel importer. *See* RCW 82.36.010(16) and 82.38.020(26). The "bulk transfer-terminal system" means the fuel distribution system consisting of refineries, pipelines, vessels, and terminals. RCW 82.36.010(4) and 82.38.020(4). Fuel in a railcar, trailer, truck, or other equipment suitable for ground transportation is not in the bulk transfer-terminal system. RCW 82.36.010(4) and RCW 82.38.020(4).

4. Fuel imported into this state in interstate or foreign commerce and intended to be sold while in interstate or foreign commerce is exempt from tax. RCW 82.36.230; *see* RCW 82.38.180(2). Fuel distributed to a federally recognized Indian tribal reservation located within the State of Washington is not *considered exported outside this state.* RCW 82.36.230 and 82.38.180(2).

5. Fuel taxes are collected through a licensing system administered by the Department of Licensing. It is unlawful for a person to engage in business in Washington as a motor vehicle importer or special fuel importer without a license from the Department. RCW 82.36.080(1) and 82.38.090(1). "Persons" include corporations. RCW 82.36.010(20) and 82.38.020(18).

6. Licensed importers are liable for taxes on fuel imported into this state. RCW 82.36.026(3) and 82.38.035(3). License holders must submit monthly fuel tax returns to the Department documenting their removals and imports. RCW 82.36.031 and 82.38.150. Payment of tax is required when the reports are submitted. RCW 82.36.035 and 82.38.160. Penalties and interest are due if the tax is not paid on time. RCW 82.36.040; 82.36.045; and 82.38.170.

7. Persons who import fuel into the state without a license are subject to the same taxes and penalties as licensees. RCW 82.36.100; *see* RCW 82.36.045(2); 82.36.080(3); and 82.38.170(3). A person who imports motor vehicle fuel into the state without a license is subject to a civil penalty of one hundred percent of the unpaid tax. RCW 82.36.080(3).

8. The Department is authorized to access taxes, penalties, and interest. RCW 82.36.045; 82.36.080(3); and 82.38.170. Where the validity of the Department's assessment is questioned, the burden is on the person who challenges the assessment to establish by a fair preponderance of the evidence that it is erroneous or excessive. RCW 82.36.045(2) and 82.38.170(3).

Cougar Den is Liable for the Tax Absent Express Federal Law to the Contrary

9. The Department asserts that Cougar Den imported fuel into the state of Washington without the licenses required by state law and failed to pay the taxes required by state law. The Department issued Assessment Number 756M to Cougar Den. Stip. Ex. 7. Cougar Den has the burden to establish by a fair preponderance of evidence that Assessment Number

756M is erroneous or excessive. RCW 82.36.045(2) and 82.38.170(3).

10. Cougar Den argues that it is exempt from the tax because of Bulk User Petroleum Permits the Yakama Nation issued to Cougar Den in 2012 and 2013 (Stip Ex. 4), and because of a Petroleum Products License Responsibilities document that the Secretary of the Yakama Tribal Council issued to Cougar Den in 1993 (Stip. Ex. 3). Cougar Den relies on the Yakama Treaty of 1855 (Stip. Ex. 1). The fuel was transported from the state of Oregon across ceded lands and Yakama Reservation lands, and delivered to Yakama-owned businesses within the Yakama Reservation. Cougar Den argues that, based on case law, it is exempt from state fuel tax and licensing requirements. Cougar Den relies primarily upon *United States v. Smiskin*, 487 F.3d 1260 (9th Cir. 2007) and *Cree v. Flores*, 157 F.3d 762 (9th Cir. 1998).

11. Outside of Indian reservations, Indians are subject to state taxes and regulations absent express federal law to the contrary. *Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 148-49, 93 S. Ct. 1267, 36 L. Ed. 2d 114 (1973). Whether a state can impose a tax that affects Indians depends on where the tax is imposed and who bears its legal incidence. If the tax is imposed outside an Indian reservation, the tax is enforceable absent express federal law to the contrary. *Wagon v. Prairie Band Potawatomi Nation*, 546 U.S. 95, 126 S. Ct. 676, 163 L. Ed. 2d 429 (2005); *Oklahoma Tax Comm'n v. Chickasaw Nation*, 515 U.S. 450, 115 S. Ct. 2214, 132 L. Ed. 2d 400 (1995).

12. Under RCW 82.36.020(2)(c) and 82.38.030(7)(c), Washington fuel taxes are imposed

when fuel "enters into this state" if the "entry is not by bulk transfer" or if the entry is by bulk transfer and the importer is not a licensee. The fuel at issue in this matter enetered into this state at the Highway 97 bridge across the Columbia River. *See* Stip. Fact 13. The entry was not by bulk transfer because it was not a transfer by pipeline or vessel. RCW 82.36.010(3) and 82.38.020(5). Therefore, the taxes in this matter were imposed when the fuel entered into this state at the Washington-Oregon boundary on the Highway 97 bridge, which is not within any Indian reservation. *See* Stip. Ex. 2.

13. The person who is liable for Washington fuel taxes is a "licensee," or a person acting as a licensee if the person does not have a license. RCW 82.36.020(1); 82.36.100; and 82.38.030(1); *see* RCW 82.36.045(2) and 82.38.170(3). "Persons" include corporations. RCW 82.36.010(20) and 82.38.020(18). Cougar Den is a corporation. Stip. Fact 7. Cougar Den owned the fuel at the time the fuel entered into this state. *See* Stip. Ex. 5. Cougar Den did not have a license. Stip. Fact 11. Cougar Den acted as a licensee because it imported fuel into the state by tank truck, which is a means other than the bulk transfer-terminal system. RCW 82.36.020(10), (12), (16) and 82.38.01(12), (15), (26). Therefore, Cougar Den bears the legal incidence of the tax.

14. Cougar Den caused fuel to be imported from Oregon to customers within the Yakama Reservation. The Yakama Reservation is a federally recognized Indian tribal reservation located within the state of Washington. *See, e.g., Washington v. Confederated Tribes & Bands of the Yakima Indian Nation*, 439 U.S. 463, 469, 99 S. Ct. 740, 58 L. Ed. 2d 740 (1979).

Cougar Den did not export the fuel outside the state of Washington because fuel distributed to a federal recognized Indian tribal reservation located within the state of Washington is not considered exported outside this state. RCW 82.36.230; RCW 82.38.180(2). The lands that the Yakama Nation ceded to the United States in Article I of the Yakama Treaty are also within the State of Washington. *See Seufert Bros. Co. v. United States*, 249 U.S. 194, 196, 39 S. Ct. 203, 63 L. Ed. 555 (1919). Therefore, the fuel that Cougar Den imported is not exempt from tax under RCW 82.36.230 or 82.38.180(2).

15. Cougar Den imported gasoline without a license from the department. A person who imports gasoline without a license is subject to a civil penalty of one hundred percent of the unpaid tax. RCW 82.36.080(3). If Cougar Den is liable for the unpaid tax, Cougar Den is also subject to the civil penalty for unlicensed gasoline imports.

16. Because the taxes, license requirements, and penalties in this matter are imposed outside of any Indian reservation, they are enforceable against Cougar Den absent express federal law to the contrary.

Federal Law Does Not Preempt the State Laws at Issue

17. Cougar Den asserts that the Yakama Treaty is "express federal law" that preempts the taxes, license requirements, and penalties in this case. Article III of the Yakama Treaty provides that, "if necessary for the public convenience, roads may be run through the said reservation; and on the other hand, the right of way, with free access from the same to the nearest public

highway, is secured to them; as also the right, in common with the citizens of the United States, to travel upon all public highways." 12 Stat. at 952-53 (Stip. Ex. 1). Members of the Yakama Nation view the Treaty as a "sacred" and "founding" document of the Yakama Nation. *Yakama Indian Nation v. Flores*, 955 F. Supp. 1229, 1237-38, 1262 (E.D. Wash. 1997), *aff'd sub. nom. Cree v. Flores*, 157 F.3d 762 (9th Cir. 1998).

18. In *Yakama Indian Nation v. Flores*, the court held that Article III of the Yakama Treaty preempted Washington state truck license and permit fees as applied to Yakama Indian-owned logging trucks that hauled Yakama Nation timber from Yakama Reservation forests over state highways to off-reservation mills. The fees were a direct charge of the Yakamas' use of public highways and were not apportioned to account for off-reservation travel. The Ninth Circuit affirmed, concluding that the right "to travel upon all public highways" clause in Article III of the Yakama Treaty "must be interpreted to guarantee the Yakamas the right to transport goods to market over public highways without payment of fees for that use." *Cree v. Flores*, 157 F.3d at 769. The *Flores* Court held that the truck license and permit fees involved in the liquidation were preempted by the Yakama Treaty "right, in common with citizens of the United States, to travel upon all public highways."

19. In *United States v. Smiskin*, 487 F.3d 1260 (9th Cir. 2007), federal officials suspected that Yakama tribal members were transporting contraband cigarettes from an Indian reservation in Idaho to various Indian reservations in Washington. The federal government indicted the members on charges of violating the federal Contraband Cigarette

Trafficking Act. The basis for the charges was the members' alleged failure to comply with a Washington state requirement that individuals give notice to state officials before transporting unstamped cigarettes within the state. The Ninth Circuit held that the notice requirement imposed a condition on travel that violated the "right, in common with citizens of the United States, to travel upon all public highways" in Article III of the Yakama Treaty.

20. Unlike the fees in the *Flores* litigation, the taxes in this matter are not a charge for Cougar Den's use of public highways. Cougar Den is not being taxed for using public highways. Cougar Den is being taxed for importing fuel. Unlike the notice requirement in *Smiskin*, the license requirements in this matter are not a condition on Cougar Den's use of public highways. Cougar Den does not need a Washington fuel importer license to transport fuel over public highways. Cougar Den needs a Washington fuel importer license to bring fuel into this state. The taxes, license requirements, and penalties in this matter are not preempted by Article III of the Yakama Treaty as construed in *United States v. Smiskin*, 487 F.3d 1260 (9th Cir. 2007) and *Cree v. Flores*, 157 F.3d 762 (9th Cir. 1998).

21. The Bulk User Petroleum Permits and Petroleum Products License Responsibilities document that the Yakama Nation issued to Cougar Den do not exempt Cougar Den from the state laws involved in this case. *See Red Devil Fireworks Co. v. Siddle*, 32 Wn. App. 521, 525, 648 P.2d 468 (1982). Though federal law can preempt state law, tribal law standing alone does not. *Washington v. Confederated*

Tribes of the Colville Indian Reservation, 447 U.S. 134, 158, 100 S. Ct. 2069, 65 L. Ed. 2d 10 (1980).

Conclusion

22. Cougar Den has not met its burden to establish by a fair preponderance of evidence that Assessment Number 756M is erroneous or excessive. RCW 82.36.045(2) and 82.38.170(3).

23. Respondent Cougar Den imported fuel to Washington from March through October 2013 in violation of chapter 82.36 and 82.38 RCW. Cougar Den owes $3,639,954.61 (as of December 9, 2013) including tax, penalties, and interest.

II. ORDER

Based upon the foregoing Findings of Fact and Conclusions of Law, the Director **ORDERS**:

2.1 The Initial Order is REVERSED, and the Program's assessment of taxes against Cougar Den, Inc. for importation of special fuel and motor vehicle fuel under Assessment Number 756M is upheld. The current amount owing and payment instructions may be obtained by contacting the Prorate and Fuel Tax Program of the Department of Licensing.

2.2 **Reconsideration.** Pursuant to RCW 34.05.470, a party has ten (10) days from the mailing of this Order to file a petition for reconsideration stating the specific grounds on which relief is requested. No matter will be reconsidered unless it clearly appears from the petition for reconsideration that (a) there is material clerical error in the order or (b) there is specific material error of fact or law. A petition for reconsideration, together with any

argument in support thereof, should be filed by mailing or delivering it directly to the Director of the Department of Licensing, P.O. Box 9020 Olympia, Washington 98507-9020, with a copy to all other parties of record and their representatives. **Filing means actual receipt of the document at the Director's office**, RCW 34.05.010(6). A copy shall also be send to Bruce L. Turcott, Assistant Attorney General, Review Counsel for the Director, PO Box 40110, Olympia, WA 98504-0110. A timely petition for reconsideration is deemed to be denied if, within twenty (20) days from the date the petition is filed, the agency does not (a) dispose of the petition or (b) serve the parties with a written notice specifying the date by which it will act on the petition. An order denying reconsideration is not subject to judicial review. RCW 34.05.470(5). The filing of a petition for reconsideration is not a prerequisite for filing a petition for judicial review.

2.3 **Stay of Effectiveness.** The filing of a petition for reconsideration does not stay the effectiveness of this Order. The Director has determined not to consider a petition to stay the effectiveness of this Order. Any such request should be made in connection with a petition for judicial review under chapter 34.05 RCW and RCW 34.05.550.

2.4 **Judicial Review.** Proceedings for judicial review may be instituted by filing a petition in superior court according to the procedures specified in chapter 34.05 RCW, Part V, Judicial Review and Civil Enforcement. The petition for judicial review of this Order shall be filed with the appropriate court and served on the Department, the Office of the Attorney General, and all parties within thirty days after

service of the final order, as provided in RCW 34.05.542.

2.5 **Service.** This Order was served on you the day it was deposited in the United States mail. RCW 34.05.010(19).

DATED this 15th day of October, 2014.

STATE OF WASHINGTON
DEPARTMENT OF LICENSING

By: s/ Pat Kohler
PAT KOHLER
Director

STATE OF WASHINGTON
OFFICE OF ADMINISTRATIVE HEARINGS
FOR THE DEPARTMENT OF LICENSING

In the Matter of Fuel Tax or Prorate Assessment Issued to, COUGAR DEN, INC., Respondent.	Case No.: 2014-DOL-0006 Agency No. 756M STIPULATION OF FACTS AND ADMISSIBILITY OF DOCUMENTS

STIPULATION OF FACTS

The Washington State Department of Licensing ("the Department") and Respondent Cougar Den, Inc. submit the following Stipulated Facts in the above-entitled proceeding.

1. The Confederated Tribes and Bands of the Yakama Nation (referred to in this proceeding as "Yakama Nation"), is a federally recognized Indian tribe.

2. The Yakama Reservation was established by the Yakama Treaty of June 9, 1855, 12 Stat. 951. Its boundaries are described in Article II of the Treaty. The ceded lands of the Yakama Nation are described in Article I of the Treaty.

3. In entering into the Treaty of 1855, the Yakama Nation ceded land ("the Ceded Area") to the United States. A map of the ceded lands is maintained by the Yakama Nation and is available to

the public at http://www.yakamanation-nsn.gov/docs/CededMap0001.pdf.

4. The Yakama Nation is a governmental authority that exercises jurisdiction within the Yakama Indian Reservation.

5. Richard "Kip" Ramsey is an enrolled member of the Yakama Nation.

6. Kip Ramsey is the owner and president of Respondent Cougar Den, Inc.

7. Cougar Den, Inc. is a private Yakama Indian-owned company incorporated under the laws of the Yakama Nation. The business office of Cougar Den, Inc. is located within the Yakama Reservation. Cougar Den Inc. is registered as a foreign corporation with the Washington Secretary of State.

8. On September 29, 1993, the Secretary of the Yakama Tribal Council issued a document to Cougar Den, Inc. entitled "Petroleum Products License Responsibilities." The Yakama Tribal Council revoked the document on October 2, 2013.

9. Since February 2012, Cougar Den, Inc. has held a motor vehicle fuel dealer's license issued by the State of Oregon.

10. In June 2012 and May 2013, Cougar Den, Inc. was issued a Bulk User Petroleum Permit by the Yakama Nation.

11. Cougar Den has never applied for or held any type of motor vehicle fuel license or special fuel license issued by the State of Washington.

12. In March 2013, Cougar Den, Inc. began exporting motor vehicle fuel (gasoline) and special fuel

(diesel fuel) from Oregon to locations within the Yakama Reservation. Cougar Den Inc. filed reports with the Oregon Department of Transportation, Fuels Tax Group, showing the number of gallons exported. The following table shows the number of gallons that Cougar Den Inc. exported from Oregon to the Yakama Reservation between March 2013 and October 2013, as reported to the Oregon Department of Transportation.

Month	Motor Vehicle Fuel (Gasoline) (gallons)	Special Fuel (Diesel Fuel) (gallons)
March 2013	18,501	23,157
April 2013	304,199	163,344
May 2013	320,652	195,661
June 2013	529,753	321,623
July 2013	537,547	295,101
August 2013	602,136	320,669
September 2013	540,516	360,579
October 2013	596,464	351,606

13. The trucks that transported the petroleum products described in the above table from Oregon to the Yakama Indian Reservation remained at all times in the state of Oregon, the Ceded Area of the Yakama Nation, or the Yakama Reservation. The trucks left Interstate 84 at Biggs Junction, Oregon, and took U.S. Highway 97 from there to the Yakama Reservation.

14. Cougar Den Inc. did not pay Washington fuel taxes on the fuel described in the above table.

15. On December 9, 2013, the Washington Department of Licensing issued Assessment Number 756M to Cougar Den, Inc. Assessment Number 756M described the taxes, penalty, and interest the Department asserted were then owed to the State of Washington with respect to the fuel shown in the above table.

16. The Respondent made a timely appeal of Assessment 756M through a Letter of Appeal, dated January 3, 2014, sent to the Department.

17. The Department referred the appeal to the Office of Administrative Hearings. On February 24, 2014, Administrative Law Judge Stephen K. Leavell issued a Notice of Prehearing Conference. Administrative Law Judge Robert Boggs conducted a prehearing conference on March 11, 2014, and Administrative Law Judge Stephen K. Leavell issued a Notice of Hearing and Prehearing Conference Order on March 12, 2014.

18. On March 31, 2014, the Department filed a Motion to Correct the Caption to delete Kip Ramsey as a respondent, leaving Cougar Den, Inc., as the sole respondent.

These stipulated facts are jointly submitted to the Office of Administrative Hearings by Cougar Den, Inc. and the Washington State Department of Licensing. Pursuant to the Prehearing Conference Order, the parties may also file affidavits or declarations which do not conflict with these stipulated facts.

STIPULATED EXHIBITS

The parties stipulate to the admissibility of the following attached exhibits:

Exhibit No.	Description
1.	Treaty With the Yakamas, 12 Stat. 951 (June 9, 1855)
2.	Map – Ceded Area and Reservation Boundary of the Confederated Tribes and Bands of the Yakama Nation (Geographic Information Systems, Yakama Nation, May 27, 2009)
3.	Petroleum Products License Responsibilities (September 29, 1993)
4.	Yakama Nation Bulk User Petroleum Permits 05-12 and 03-13
5.	State of Oregon Motor Vehicle Fuel and Aircraft Fuel License Tax Reports submitted to the Oregon Department of Transportation by Cougar Den Inc., for the months of March 2013 through October 2013
6.	Resolution T-002-14
7.	Assessment Number 756M
8.	Fuel Tax Agreement Concerning Motor Vehicle Fuel and Special Fuel Between the Confederated Tribes and Bands of the Yakama Nation and the State of Washington (effective date of November 22, 2013)
9.	Revised Yakama Nation Law and Order Code, chapter 30.11

The parties reserve the right to offer additional exhibits, subject to objections regarding admissibility.

DATED this 5th day of April, 2014.

OFFICE OF THE ATTORNEY GENERAL

By *Fronda Woods*

Fronda C. Woods, WSBA #18728

Attorney for Agency

STOKES LAWRENCE VELIKANJE MOORE & SHORE

By *Andre Penalver 43073*

Andre M. Penalver, WSBA # 43073

Attorney for Respondents